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Supreme Court, U.S.
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No.____

In The

Supreme Court of the United States

October Term, 1989

David R. Webb Company, Incorporated,
Petitioner,

v.

National Labor Relations Board,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under the National Labor Relations Act ("Act"), an economic striker:

   (a) who is offered reinstatement to a position for which he is qualified, as required by *NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967);

   (b) who voluntarily accepts that offer; and

   (c) who is subsequently discharged from that position for cause,

   nevertheless continues after the discharge to have reinstatement rights to his pre-strike or an equivalent position.

2. Whether the Court of Appeal's holding that an economic striker has continuing reinstatement rights in these circumstances contravenes Section 10(c) of the Act, 29 U.S.C. § 160(c), which provides that no order of the National Labor Relations Board shall require the reinstatement of an employee who has been discharged for cause.

LIST OF PARTIES

All parties are listed in the caption. The National Labor Relations Board's Order at issue grants relief for the benefit of three employees named Eugene McGaha, Alice Hill, and Rex Young.

RULE 29.1 LIST

David R. Webb Company, Incorporated is owned by Anbe Gmbh. Neither David R. Webb Company, Incorporated, nor its parent are publicly held companies. David R. Webb Company, Incorporated does not have any subsidiaries.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, David R. Webb, Incorporated ("Webb"), respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") in the above-entitled proceeding.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 888 F.2d 501, and is reprinted in the Appendix hereto. (Appendix ("App."), *infra*, 1a-22a).

The Decision and Order of the National Labor Relations Board is reported at 291 NLRB No. 36, and is reprinted in the Appendix hereto. (App., *infra*, 23a-44a).

JURISDICTION

The Seventh Circuit's opinion and judgment was entered on October 31, 1989. Webb filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc on November 13, 1989. The Seventh Circuit denied the Petition for Rehearing and Suggestion for Rehearing En Banc on December 7, 1989. (App., *infra*, 45a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 29 U.S.C. § 160(e).

STATUTES INVOLVED

1. 29 U.S.C. § 152(3)
2. 29 U.S.C. § 158(a)(1)
3. 29 U.S.C. § 158(a)(3)
4. 29 U.S.C. § 160(c)

The statutes listed above are reprinted in the Appendix hereto. (App., *infra*, 46a-49a).

STATEMENT OF THE CASE

1. *Basis of Federal Jurisdiction.*

This is an action to review an Order of the National Labor Relations Board ("Board"). The Seventh Circuit had jurisdiction of Webb's Petition for Review pursuant to Section 10(f) of the National Labor Relations Act ("Act"), 29 U.S.C. § 160(f). The Board thereafter filed a cross-application for enforcement pursuant to 29 U.S.C. § 160(e).

2 *Facts Material to Questions Presented.*

Webb is engaged in the manufacture and sale of lumber products. Webb employs approximately 400 employees, 260 of whom were, at the time of the strike, represented for purposes of collective bargaining by the Chauffeurs, Teamsters, Warehouseman and Helpers Union, Local 135 ("Union").

On July 28, 1986, 246 of Webb's production and maintenance employees began an economic strike after Webb and the Union were unable to reach agreement on the terms of a new collective bargaining agreement. On November 3, 1986, the Union made an unconditional offer on behalf of the striking employees to return to work. By then the jobs of many striking employees, including Eugene McGaha, Alice Hill and Rex Young, the three employees at issue in this case, had been lawfully filled by permanent replacements.

After the Union's unconditional offer, the names of all striking employees who had been permanently replaced, including those of McGaha, Hill and Young, were placed on a preferential recall list arranged according to qualifications and seniority. The recall procedure was not alleged to be unlawful and its validity has never been an issue in this case. (App., *infra*, 2a).

By February, 1987 the three employees involved in this case had reached the top slots on the recall list. At that time, neither their pre-strike jobs, nor jobs substantially equivalent to their pre-strike jobs, were available. The only vacant jobs were in the dryer-feeder classification, which is an entry level classification. Accordingly, each of these three employees was offered the entry level job of dryer-feeder operator. Each, after being told what the job entailed, voluntarily accepted the position. Each subsequently failed to perform satisfactorily and was terminated for poor job performance after attempts to

improve their performance failed. (App., *infra*, 2a). At the time these employees were discharged, neither their pre-strike nor substantially equivalent jobs were vacant.

It was not alleged, nor did the Board or Seventh Circuit find, that these employees were unqualified to perform the entry level jobs which they voluntarily accepted. Other reinstated strikers whose pre-strike jobs were not available when they became eligible for reinstatement were also offered and accepted the dryer-feeder operator position. Only the three employees at issue in this case were discharged from that position for poor performance. All of the other reinstated strikers performed the job satisfactorily.

3. *Proceedings Below.*

Based on these facts, the Board's Regional Director for Region 25 issued a Complaint alleging that Webb violated Sections 8(a)(1) and 8(a)(3) of the Act, 29 U.S.C. §§ 158(a)(1) and (3), by failing to recall McGaha, Hill and Young to their former or substantially equivalent positions because they had participated in the strike, and in order to discourage employees from engaging in such concerted activities.

After a hearing, an Administrative Law Judge ("ALJ") issued his decision finding that Webb had not satisfied its reinstatement obligations under *Laidlaw Corporation v. NLRB*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970), and therefore had violated Sections 8(a)(1) and 8(a)(3). The ALJ initially found, as Webb had acknowledged, that the entry level dryer-feeder operator position was not substantially equivalent to these employees' pre-strike positions. (App., *infra*, 34a). The ALJ concluded that an economic striker's reinstatement rights under *Laidlaw* entitle him to no less than reinstatement to his pre-strike or a substantially equivalent job.

Accordingly, although he did not find the discharges themselves unlawful, the ALJ held that Webb violated *Laidlaw* by refusing to offer the three discharged employees further reinstatement in the future when their pre-strike or substantially equivalent positions became vacant. (App., *infra*, 38a).

Webb timely appealed the ALJ's decision to the Board. The Board concluded that given the three employees' poor performance in the dryer-feeder position, Webb "was not obliged to retain these employees in that position". (App., *infra*, 24a n.3). The Board agreed with the ALJ, however, that *Laidlaw* requires no less than reinstatement to the strikers' pre-strike or a substantially equivalent job, and that the three employees' discharge for poor performance in the dryer-feeder position, "which was not substantially equivalent to their pre-strike positions, could not provide a basis for [Webb's] failure to continue to extend to these employees their *Laidlaw* rights." (App., *infra*, 24a n.3). The Board thus held that even though the three strikers were lawfully reinstated to positions for which they were qualified, and even though they were lawfully discharged for poor performance (that is, "for cause"), Webb violated *Laidlaw* by refusing to offer them any further reinstatement rights.

On review, the Seventh Circuit enforced the Board's Order. The starting point for the Seventh Circuit's analysis was this Court's decision in *NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967).[1] In that case, striking employees made an unconditional offer to return to work at the conclusion of an

[1]Neither the ALJ nor the Board found that Webb's conduct violated *Fleetwood*, and neither mentioned Webb's obligation under *Fleetwood*, discussed *infra*, to reinstate the three strikers to positions for which they were qualified. Both based their decisions only on Webb's alleged violation of *Laidlaw*.

economic strike. Despite this unconditional offer, the employer hired new employees to fill positions for which the strikers were qualified. *Fleetwood* found this conduct violated the Act, because:

> If, after the conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by . . . the Act. . . . Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to "legitimate and substantial business justifications," he is guilty of an unfair labor practice.

389 U.S. at 378.

The *Fleetwood* opinion focused on the absence of a "legitimate and substantial business justification" for the employer's refusal to offer ecomonic strikers reinstatement to vacant positions for which they were qualified. The absence of such a justification, this Court reasoned, supplied the necessary inference that the employer was motivated by anti-union animus in filling the vacancies, rather than by legitimate business concerns. *Fleetwood* therefore held that:

> *If and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement.* The right can be defeated only if an employer can show "legitimate and substantial business justifications."

389 U.S. at 381 (emphasis supplied).

In *Laidlaw*, the Seventh Circuit extended *Fleetwood* to hold that an economic striker's right to reinstatement is not extinguished merely because permanent replacements are hired

during the strike. The court held that in the absence of a "legitimate and substantial business justification," when positions become vacant after a strike an employer is obligated first to offer reinstatement to eligible striking employees before hiring individuals who did not participate in the strike. Under *Laidlaw*, an employer is required to offer reinstatement to economic strikers in a non-discriminatory manner when positions for which they are qualified become available.

Thus, both *Laidlaw* and *Fleetwood* focused on the adverse impact an employer's failure to extend reinstatement rights to strikers has on the exercise of rights guaranteed by the Act. In neither case did the employer offer strikers reinstatement to vacant positions for which they were qualified, and in neither case did the employer articulate a legitimate business justification to support its refusal to reinstate the former strikers. In the absence of any such justification, both decisions inferred that the failure to extend strikers an offer of employment was based solely on their participation in the strike -- a protected activity. Accordingly, it was the employers' refusal to extend offers of reinstatement which constituted the basis for the holdings in both *Fleetwood* and *Laidlaw*.

In its decision below, the Seventh Circuit conceded that neither *Fleetwood* nor *Laidlaw* specifically addressed the issues raised by this case. (App., *infra*, 7a). Neither case held that an employer must reinstate an economic striker to his former or a substantially equivalent job in order to satisfy the Act, and neither determined whether an intervening discharge for cause was a "legitimate and substantial justification" which extinguished an employee's right to further or future reinstatement.

The Seventh Circuit held, however, that *Fleetwood* is not satisfied by offering reinstatement to an employee in a position for which he is qualified and which he voluntarily accepts;

rather, he must be reinstated to his former or a substantially equivalent position. (App., *infra*, 9a-10a; 16a). The court further held that even though *Fleetwood* requires an employer to reinstate a striker to a position for which he is qualified, and even though the striker accepts that position, his reinstatement rights continue under *Fleetwood* if he is discharged "for cause" from that position (i.e., prior to obtaining his former or a substantially equivalent job). (App., *infra*, 17a-18a). The Seventh Circuit concluded that a discharge "for cause" under these circumstances does not constitute a "legitimate and substantial business justification" for extinguishing reinstatement rights. (App., *infra*, 18a).[2]

REASONS FOR GRANTING THE WRIT

The Seventh Circuit's decision creates a conflict in the circuits on an important and recurring issue of federal labor law, namely, the extent of an employer's obligation to reinstate economic strikers who make an unconditional offer to return to work. This issue cuts to the core of the Act's fundamental objective: protecting an employer's right to discipline and direct its work force, while at the same time protecting employees' rights to engage in protected concerted activity. This Court has never addressed the specific issues raised by this Petition, and has not visited the Act's reinstatement requirements in twenty-three years. Review by this Court is warranted

[2]In reaching this result, the Seventh Circuit recognized that Webb had a legal obligation to offer the three employees reinstatement in the dryer-feeder position, and that the employees were later lawfully discharged. The court noted that "we do not question Webb's act of discharging the employees from the dryer-feeder position" (App., *infra*, 12a n.7), and that "[t]he [employees'] failure to adequately perform the dryer-feeder job was cause for termination from that position, as the NLRB stated." (App., *infra*, 17a).

both to provide a uniform analysis on these significant issues, and to remove the untenable restrictions the decision below places on an employer's *statutory* right to discharge an employee "for cause".

1. *The Seventh Circuit's Decision Directly Conflicts With The Decision In* NLRB v. American Olean Tile Co., Inc., *826 F.2d 1496 (6th Cir. 1987).*

In *American Olean Tile*, the Sixth Circuit held that an employer's reinstatement obligations under *Fleetwood* were satisfied fully when the economic strikers were *offered* jobs for which they were qualified, whether or not they accepted those jobs. In refusing to enforce a Board Order, the Sixth Circuit concluded that *Fleetwood* only requires that strikers be offered reinstatement to positions for which they are qualified, not a former or substantially equivalent position. The Sixth Circuit stated that:

> We conclude that the reinstatement of the twelve employees occurred when they were recalled to work at Lewisport and the transfers to Cloverport merely completed the process adopted by the employer and communicated to the offerors. *The law requires reinstatement when a vacancy occurs for which an offerer is qualified, whether in his previous position or a substantially equivalent one, or not.* [Citing *Fleetwood*] The ALJ's construction would permit an employee to decline an offer of reinstatement to a position for which he was merely qualified and later demand reinstatement to his former position or to a substantially equivalent one when it became vacant.
>
> * * *

> In the situation presented by this case, *an unconditional offer required an employee to make himself available for recall to any job within the bargaining unit . . . for which he was qualified.*

826 F.2d at 1501-02 (emphasis supplied).

The magnitude of the conflict between the Sixth Circuit's and the Seventh Circuit's interpretation of this Court's *Fleetwood* decision can hardly be overstated. The Seventh Circuit's decision necessarily holds, contrary to *American Olean Tile*, that an offer of reinstatement to a position for which the striker is qualified does not satisfy *Fleetwood* -- although that offer is required by *Fleetwood*. The Seventh Circuit goes further and holds, first, that the striker's *acceptance* of that offer does not satisfy *Fleetwood* and, second, that the striker's subsequent lawful *discharge for cause* from that position does not satisfy *Fleetwood*. Employers asking how to satisfy their legal obligations under *Fleetwood* are given fundamentally different answers in *American Olean Tile* and the decision below.[3]

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[3] Although the Seventh Circuit attempts to understate the extent of this conflict, it ultimately acknowledges that:

> The court in *American Olean Tile* also stated that an *offer* of a position for which the striking employee is qualified, even if that position is not the substantial equivalent of the employee's pre-strike position, satisfies the employer's obligations under *Laidlaw*. Webb expressly refused to argue such position to this Court, and *our holding that the actual acceptance of such an offer does not abort the employee's* Laidlaw *rights obviously rejects a mere offer as being sufficient.*

(App., *infra*, 15a n.9) (emphasis supplied).

Because the three strikers involved in this case had accepted Webb's offer of reinstatement, there was no reason for Webb to ask the Seventh Circuit to adopt *American Olean Tile's* holding that merely

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The Seventh Circuit stated that its departure from *American Olean Tile* was appropriate because: "The Eighth and Ninth Circuits have specifically stated that employees must be reinstated to their prior or substantially equivalent positions before an employer's obligation is satisfied." (App., *infra*, 7a). The cases to which the Seventh Circuit refers are *NLRB v. Rockwood & Co.*, 834 F.2d 837 (9th Cir. 1987), and *Medallion Kitchens, Inc. v. NLRB*, 811 F.2d 456 (8th Cir. 1987). The Seventh Circuit, however, misstates the holdings in these two cases, which actually support Webb's position in this matter. In so doing, it further illustrates the confusion among the circuits on the scope of *Fleetwood's* reinstatement requirements.

In *Rockwood*, the Ninth Circuit stated in the course of its discussion that an economic striker is "entitled to reinstatement to his former position, to one substantially equivalent, *or* to one for which he [is] qualified". 834 F.2d at 841 (emphasis supplied). The court's use of the disjunctive supports Webb's position that an employer who offers an economic striker a position for which he is qualified, where no substantially equivalent position is available, satisfies *Fleetwood* -- especially where the offer is accepted. Indeed, the Ninth Circuit cites *American Olean Tile* as authority for its statement of *Fleetwood's* requirements. *Id.*

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offering a qualified position satisfies *Fleetwood*. Webb did argue, however, that *American Olean Tile* was correct insofar as it held that *Fleetwood* is satisfied short of reinstating an employee to the same or a substantially equivalent position. Obviously, if merely *offering* an economic striker reinstatement to a position for which he is qualified is sufficient, then a striker's *acceptance* of such an offer satisfies the Act's requirements.

In *Medallion Kitchens*, the Eighth Circuit upheld the Board's finding that an employer violated *Fleetwood* where it hired 27 *new* employees to fill positions while there were economic strikers who had not been offered any form of reinstatement. This, of course, was the issue resolved in *Fleetwood*. In its discussion, the Eighth Circuit indicates that *Laidlaw* is satisfied both by an offer of substantially equivalent employment *and* by an offer of employment for which the striker is qualified. 811 F.2d at 459. The Eighth Circuit did not have to differentiate between the two in *Medallion Kitchens* because it found that the positions to which the strikers were not reinstated were substantially equivalent to their pre-strike positions. 811 F.2d at 460. Obviously, if the positions were substantially equivalent to the strikers' pre-strike jobs, they were positions for which the strikers were qualified.

There are, therefore, no cases which support the Seventh Circuit's holding in this case.[4] The decision below is the first

[4]The Seventh Circuit also cites *Kurz-Kasch, Inc. v. NLRB*, 865 F.2d 757 (6th Cir. 1989) and *Hajoca Corp. v. NLRB*, 872 F.2d 1169 (3rd Cir. 1989). In neither of those cases, however, was it necessary to distinguish between substantially equivalent positions and positions which strikers are qualified to hold. As noted above, where an employer refuses to reinstate an employee to any position, and the employee's pre-strike job ultimately becomes available, it is not necessary to distinguish between a "substantially equivalent" position and one for which the employee is "qualified" -- the two are the same.

The Seventh Circuit also erroneously states that "[t]he NLRB has consistently taken the position that employers must reinstate striking employees to their former or substantially equivalent positions before an employer's *Laidlaw* obligations are satisfied," (App., *infra*, 9a, citing *Providence Medical Center*, 243 NLRB 714 (1979) and *Ford Bros., Inc.*, 294 NLRB No. 10 (1989)). The Board's findings in those cases do not support the court's holding. In *Ford Bros.*, the employer refused to reinstate economic strikers *at all*, even though there was

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ever to hold that *Fleetwood's* is not satisfied by an employee's acceptance of the reinstatement offer which *Fleetwood* requires -- that is, reinstatement to a position for which the striker is qualified where, as here, his pre-strike position or its equivalent is not available. Moreover, no decision even remotely supports the conclusion that *Fleetwood* reinstatement rights continue even after the striker accepts an offer of reinstatement and then is discharged for cause.[5]

"no evidence that any of the economic strikers were permanently replaced". *Id.* at 50. Thus, when they were refused reinstatement their *pre-strike* positions were vacant. In *Providence Medical Center*, the Board found that "in offering reinstatement to the employees, [the employer] was motivated by a desire to rid itself of them because they had engaged in the strike", 243 NLRB 739, and that employees "were forced to accept positions inferior to their pre-strike positions or be terminated." *Id.* at 744. As noted, neither the Board nor the Seventh Circuit found Webb was motivated by such animus, and it is undisputed the three strikers at issue voluntarily accepted Webb's offers. Moreover, the ALJ's opinion in *Providence* specifically noted that the employer "did not offer any legitimate and substantial business justification for its policy of terminating strikers' preferential recall rights" before they were offered a substantially equivalent position. Id. at 744 n.67. Webb has advanced such a justification -- discharge for cause -- in this case.

[5]The Seventh Circuit acknowledged that the Act nowhere guarantees an economic striker the same or a substantially equivalent job at the strike's conclusion. (App., *infra*, 9a-10a). The term "substantially equivalent employment" is contained only in Section 2(3) of the Act, 29 U.S.C. § 152(3), which provides that an individual who is not working "as a consequence of, or in connection with, any current labor dispute . . . and who has not obtained any other regular and substantially equivalent employment remains an employee for purposes of the Act." Thus, the phrase "substantially equivalent employment" is used only in reference to employment obtained with *another employer* during the strike.

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2. *The Seventh Circuit's Decision Also Contravenes The Plain Language Of § 10(c) Of The Act, And Erroneously Limits* Fleetwood's *"Legitimate And Substantial Business Justification" Exception.*

The Seventh Circuit found, as did the Board, that the three returning strikers were discharged "for cause", i.e., poor job performance while working in a job for which they were qualified. Since the three individuals were discharged "for cause", the Board's order of reinstatement and backpay is in direct violation of Section 10(c) of the Act, 29 U.S.C. § 160(c). Section 10(c) states that:

> No order of the Board shall require the reinstatement of *any* individual *as an employee* who has been suspended or discharged or the payment to him of any backpay if such individual was suspended or discharged *for cause*. (Emphasis supplied).

Despite this unambiguous statutory prohibition, the Seventh Circuit held that the Board properly ordered further reinstatement of the three strikers in this case -- who already had been lawfully reinstated -- after they were lawfully discharged "for cause". The Seventh Circuit concluded that:

> We read this statute as prohibiting the Board from ordering employees reinstated to positions from which they were discharged. Webb's argument that § 160(c)

In addition to the plain language of the Section 2(3), the legislative history highlights the actual intent of Congress: "As under the present Act, a striker, under the Bill, would lose his status as an 'employee' if he obtained 'other regular and substantially equivalent employment' while the strike was in progress." H. Rep. No. 245, 80th Cong. 1st Sess. (1947), reprinted in Legislative History of the Labor Management Relations Act, 1947, Volume I, at 303 (1959).

> bars reinstatement here is based on its mistaken assumption that the three employees had been sufficiently reinstated at the time of their discharge from the dryer-feeder position, and that they had lost their status as 'employees' under the Act. It is true that once the employees are fully reinstated to their former or substantially equivalent positions, Webb has the right to discharge them for any reason.

(App., *infra*, 20a-21a).

This holding is patently inconsistent with the plain language of the statute. Section 10(c) does not distinguish between *positions* to which an employee is reinstated -- it prohibits reinstatement *as an employee*. The legislative history leading to the passage of Section 10(c) could not be more emphatic on this point: "If a man is discharged for cause, he cannot be reinstated." H. Rep. No. 245, 80th Cong. 1st Sess. (1947), reprinted in Legislative History of the Labor Management Relations Act, 1947, Volume II, at 1593 (1959).[6]

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[6]The Seventh Circuit has previously recognized this plain intent. In *Woodlawn Hospital v. NLRB*, 596 F.2d 1330 (7th Cir. 1979), the court stated that:

> The Board and the courts have concluded in a variety of circumstances that a discharge for activity not protected by the Act terminates employee status and precludes a finding that the employer has committed an unfair labor practice for refusal to reinstate . . . "[I]t is well-established that an employer may discharge an employee for good reason, for bad reason, or for no reason, provided that it is not for a reason proscribed by the statute."

596 F.2d at 1336, quoting *Acrylic Optics Corp.*, 222 NLRB 1105, 1106 (1976).

Moreover, in *Fleetwood*, this Court held that an employer may refuse to reinstate an economic striker if it shows that its decision was based on a "legitimate and substantial business justification". 389 U.S. at 378. The Seventh Circuit concluded that only two such legitimate and substantial business justifications exist: (1) if permanent employees are hired during the strike to continue normal business operations; or (2) if strikers' jobs are eliminated for substantial and bona fide reasons. (App., *infra*, 17a n.10).

There is no indication in *Fleetwood* that these would be the only business reasons recognized, and one is hard-pressed to identify a more legitimate business justification than a discharge "for cause". Indeed, the Board has never held that an employee's right to reinstatement under *Fleetwood* is extinguished *only* by reinstating him to his former or a substantially equivalent position. Numerous Board cases hold that strikers who are discharged for conduct not protected by the Act lose their right to reinstatement "even if such misconduct was engaged in as an incident to the strike." *Woodlawn Hospital*, 233 NLRB 782, 787 (1977); *see Facet Enterprises, Inc.*, 290 NLRB No. 25, at 41 (1988). Even a change in the employer's business can provide a "legitimate and substantial business reason" for extinguishing reinstatement rights. *See Salinas Valley Ford Sales, Inc.*, 279 NLRB 679, 692 (1986).

The effect of the decision below is that an employer is stripped of its fundamental right -- expressly preserved to employers by Congress in Section 10(c) -- to discharge an employee "for cause". In *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941), this Court noted that:

> The statute does not touch "the normal exercise of the right of the employer to select its employees or to discharge them." It is directed solely against the abuse

> of that right by interfering with the countervailing right of self-organization.

313 U.S. at 187. The Seventh Circuit's decision, quite simply, is the first decision *ever* to hold that the Board may order reinstatement of an employee who is discharged for a reason not proscribed by the Act -- that is, "for cause".

The Seventh Circuit's holding, therefore, extends *Fleetwood* and *Laidlaw* far beyond their original limits and far beyond the Act's protective reach. The Seventh Circuit refers to this extension of *Fleetwood* and *Laidlaw* as "residual *Laidlaw* rights" or "residual strikers' recall rights". Under these "residual rights", created out of whole cloth in this case, an employee discharged "for cause" while working in a position for which he is qualified continues to have recall rights until he reaches his pre-strike or a substantially equivalent job. But for this judicially created exemption from discharge, properly reinstated strikers, like any other employee, could be discharged "for cause" under the Act with no right to future reinstatement. The Seventh Circuit, therefore, has effectively amended the Act as it pertains to an employer's right to discipline its employees. This amendment requires that after each job offer -- compelled by *Fleetwood* -- and each subsequent discharge *for cause*, an economic striker must be returned to the recall list until he is reinstated to his former or a substantially equivalent job.

The Seventh Circuit justifies this unprecedented abrogation of an employer's rights under Section 10(c) by reasoning that "employees will be deterred from striking if their employer can reinstate them to a lower-level position and thereby fulfill his [sic] obligations under *Laidlaw*". (App., *infra*, 11a). This simply is not true.

First, Webb was *required by law* to offer the three economic strikers at issue in this case any position for which they were *qualified* when that position became available. *Fleetwood*, 389 U.S. at 381; *Arlington Hotel Company, Inc. v. NLRB*, 785 F.2d 249, 251 (8th Cir.), *cert. denied*, 479 U.S. 914 (1986). There is no dispute that when these three strikers became eligible for reinstatement, their pre-strike or substantially equivalent positions were not available. Further, they were qualified to perform the dryer-feeder job, and they voluntarily accepted Webb's offer. Thus, Webb's offer of employment in this case was not a device to coerce or lure unwary strikers into accepting positions from which they later could be terminated: Webb did what the law required.

Second, the Seventh Circuit mistakenly assumes that the Act guarantees employees specific jobs, or at least jobs they prefer. But the Act only guarantees that striking employees may not be discriminated against for engaging in activity protected by the Act. *See Phelps Dodge Corp., supra*. Unlike the employer conduct in *Fleetwood* and *Laidlaw*, Webb's conduct here has no discouraging effect on protected activity. The Seventh Circuit nowhere explains how requiring lawfully reinstated strikers to meet the same standards as all other employees discourages, or infringes upon, an employee's right to strike, or any other right under the Act.

Third, Sections 8(a)(1) and 8(a)(3) of the Act, 29 U.S.C. §§ 158(a)(1) and (a)(3), already protect reinstated strikers from subsequent adverse employment decisions based upon their participation in a strike. *Fleetwood* and *Laidlaw* are decisions which *extend* the protections of the Act to *non*-reinstated strikers. Once a striker voluntarily accepts an offer of reinstatement, he is once again employed and fully protected against discrimination based upon protected activity by Sections

8(a)(1) and 8(a)(3). If, for instance, a striker is first recalled to a position for which he is qualified because his pre-strike position or its equivalent is not available at that time, and he is later wrongfully discharged or denied a transfer to his former or a substantially equivalent position, he has a complete remedy under Sections 8(a)(1) and 8(a)(3). Thus, the protections and rights extended by *Fleetwood* and *Laidlaw* become irrelevant after reinstatement; the employee is protected from discrimination by specific provisions of the Act.

Indeed, the Board's Complaint in this matter alleged that the three reinstated strikers at issue in this case were discharged *because of* their participation in the strike in violation of Sections 8(a)(1) and 8(a)(3). The Board, however, was unable to establish any such anti-union animus. Other strikers were recalled to the same job as the three individuals in this case and performed ably. These were, after all, entry level positions. The record shows that the three employees at issue in this case simply did not put forth the requisite effort -- unlike other reinstated strikers -- and that they were lawfully terminated for poor performance. In the absence of evidence that these particular strikers were treated differently based on strike-related activities, the Board was forced to invent the "violation" of *Fleetwood* which is the subject of this Petition.

3. *The Seventh Circuit's Decision Unreasonably Restricts An Employer's Right To Operate During And After A Strike, And Is An Invitation To Needless Litigation.*

The Seventh Circuit's decision establishes a decidedly unbalanced equation: an employer who does what *Fleetwood* requires -- reinstates an employee to a position for which he is qualified -- has no right to discharge that employee, for *any* reason, from the time the employee enters the work force until he obtains his former or a substantially equivalent job. Con-

versely, that employee has no obligation to perform up to an employer's legitimate, non-discriminatory expectations because his employment cannot be terminated. This result is contrary to the Act's purposes and unreasonably restricts an employer's right to operate during and after a strike. It is also an invitation to years of needless litigation before the Board and courts.

The novelty of the Seventh Circuit's holding is readily apparent: an employer is *required by law* to offer a striker the first available position for which he is qualified; if the striker accepts, he then has an unrestricted right to employment with that employer until he is reinstated to his former or a substantially equivalent position -- which could take *years*; and if he is discharged for cause, he simply goes back to the top of the recall list. This procedure is repeated, *ad infinitum*, until he reaches his former or a substantially equivalent job. During this entire time, of course, the employer is receiving unsatisfactory job performance, and yet is prohibited from hiring non-strikers to fill vacant positions for which the striker is qualified.

The impact of this procedure on an employer such as Webb, which had approximately 200 strikers on its recall list at one time, will be enormous. Not only will it have a devastating impact on an employer's statutory right to achieve production during and after a strike, *see NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), it also will become nearly impossible to administer the recall list in compliance with law.

The Seventh Circuit's holding is all the more troubling when one considers that it potentially encompasses *all* discharges "for cause", including absenteeism; acts of theft or violence; possession of narcotics; or even sabotage. The Seventh Circuit conceded the practical problems created by its decision, but offered no immediate guidance to employers as

to when the right to further reinstatement does not apply. (App., *infra*, 11a).

The Seventh Circuit's opinion, therefore, creates an untenable circumstance for employers and is an invitation to years of needless litigation before the Board and federal courts. The "bright line" in termination cases in the past has been simply whether the employee was discharged "for cause", that is, for a reason not proscribed by the Act. If the answer was "yes", there was no violation of the Act; if "no", then the opposite result was reached. Now, presumably, an employee who assaults a supervisor, commits acts of theft or otherwise violates established work rules will be entitled to future reinstatement *even though he has engaged in conduct which the Act does not protect.* He retains his status as an employee solely because of the fortuitous circumstance that when he was reinstated, his former or a substantially equivalent position was not available.

The Seventh Circuit is thus simply wrong when it states: "Our holding does not immunize employees from discipline who are reinstated to positions not the substantially equivalent of their pre-strike positions." (App., *infra*, 14a). *This is the single most devastating implication of the holding.* If the employee engaged in such conduct under any other circumstances, he could be terminated without any right to reinstatement under the Act. The Seventh Circuit's opinion creates a circumstance where economic strikers reinstated to positions for which they are qualified are treated more favorably under the Act than all other employees; they are effectively guaranteed jobs under circumstances where other non-striking employees, and former striking employees reinstated to substantially equivalent positions, enjoy no such advantage.

This Court should recognize an employer's right to expect competent performance from employees who elect reinstate-

ment in positions for which they are qualified. If the law imposes upon an employer the legal obligation to offer economic strikers positions for which they are qualified, the law should also impose a parallel requirement on the returning striker to perform up to the employer's legitimate, non-discriminatory expectations.

For these reasons, as well as the conflict and confusion between the circuits in interpreting *Fleetwood* and the plain contravention of Section 10(c), this Court should review the decision below and restore the balance to the Act which that decision eliminates.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Nos. 88-3204 & 88-3344
DAVID R. WEBB COMPANY, INCORPORATED,
Petitioner, Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent, Cross-Petitioner.

On Petition for Review, and Cross-Application
for Enforcement of an Order
of the National Labor Relations Board.
NLRB Case No. 25-CA-18553

ARGUED JUNE 16, 1989--DECIDED OCTOBER 30, 1989

BEFORE POSNER, RIPPLE and MANION, Circuit Judges.

MANION, Circuit Judge. David R. Webb Company (Webb) petitions for review of an order of the National Labor Relations Board (NLRB or the Board), in which the Board found that Webb violated Sections 8(a)(1) and (3) of the Labor-Management Relations Act (the Act), 29 U.S.C. §§ 158(a)(1) and (3), by failing to reinstate three striking employees to their pre-strike positions or the substantial equivalent of those positions. The NLRB filed a cross-application for enforcement of

this order.[1] For the reasons stated below, we enforce the NLRB order.

I.

On July 28, 1986, 246 of Webb's 260 production and maintenance employees began an economic strike. On November 3, 1986, the striking employees unconditionally offered to return to work. By then, the positions of the three employees involved in this case had been filled by permanent replacements, and therefore the employees were placed on a preferential recall list, arranged according to qualifications and seniority.[2]

By February, these three employees had reached the top three slots on the recall list. Webb offered Alice Hill an entry level position as a "dryer-feeder."[3] She accepted the job but performed poorly, and Webb terminated her after one day. Rex Young replaced Hill, but he lasted two days and was terminated. Eugene McGaha followed Young and two days later Webb terminated him as well. There is little dispute that the three

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[1]We consolidated the petition and cross-appeal on December 7, 1988.

[2]The validity of the recall list has at no time been an issue in this action.

[3]Dryer-feeders are required to load pieces of wood veneer onto a lift, and then raise or lower the lift and flip the veneer upward into a vacuum pump which sends the veneer on to a belt and then into a dryer. This was a lower level position than any of the three employees had held before the strike. Prior to the strike, Alice Hill held a position as a labeler in the clipping and measuring department, Rex Young was a flitch cleaner and handler, and Eugene McGaha was a truck driver, fork-lift operator and store room clerk.

employees failed to perform satisfactorily as dryer-feeders. Webb, however, did not return any of the three to the recall list.

The NLRB issued a complaint against Webb, claiming it had engaged in unfair labor practices in violation of Sections 8(a)(1) and (3) of the Act[4] by rehiring workers for positions that were not the substantial equivalent of their pre-strike positions, and then terminating them not only from that position but also from their right to recall to their original positions, or the substantial equivalent of those positions. The Board relied on *Laidlaw Corp. v. NLRB*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970), for the proposition that employers violate Sections 8(a)(1) and (3) of the Act by failing to reinstate striking employees to their former or substantially equivalent positions (as they became available) after the employees have unconditionally offered to return to work following an economic strike.

Webb argued before the ALJ, as it argues on appeal, that Laidlaw does not require an employer to reinstate an employee to a position substantially equivalent to his pre-strike position; rather, Webb argues that any rights the employees had as economic strikers were abrogated upon *acceptance* of the lower-level dryer-feeder position. Webb contends that a striker who accepts a job other than his pre-strike position forfeits his right to future recall to that position if he is unable to perform the job he accepts and is terminated from that position. Alternatively, Webb argues that even if the employees have such a

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[4]Section 8(a)(1) prohibits employers from interfering with employees' rights of self-organization, concerted action, and collective bargaining, and Section 8(a)(3) prohibits discrimination in employment that encourages or discourages membership in any labor organization.

right under *Laidlaw*, Webb had offered a legitimate and substantial business justification for not reinstating these three employees to their former or substantially equivalent positions.

II.

The ALJ held that the termination of the employees from the lower-level position and the simultaneous termination of their preferential recall rights violated Sections 8(a)(1) and (3) because Webb failed to offer a legitimate and substantial business justification for its failure to satisfy the employees' *Laidlaw* reinstatement rights. The ALJ held that those reinstatement rights included the right to eventually be recalled to their pre-strike positions or one substantially equivalent, without any impairment to the employees' previous seniority rights and other benefits. Because the pre-strike positions of two of the employees (Hill and Young) became vacant after their termination from the dryer-feeder position, the ALJ ordered Webb to reinstate the employees to their pre-strike positions. The ALJ ordered Webb to reinstate the third employee (McGaha) to his pre-strike truck driver position, if available, or to a substantially equivalent position if the truck driver position was still held by the permanent replacement who filled the position during the strike. The ALJ also ordered Webb to make the three employees whole for any loss of pay from the date they should have been reinstated to their original positions, or in McCaha's case, to a substantially equivalent position.

Webb filed exceptions to the ALJ's decision with the NLRB. After reviewing the ALJ's opinion, the NLRB issued an order adopting the ALJ's rulings, findings and conclusions. That order, however, clarified the ALJ's decision by emphasizing that because of the poor performance of the three employees in the dryer-feeder position, Webb was not required to retain them in that position; but because that position was not substan-

tially equivalent to the employees' pre-strike positions, Webb failed to offer reinstatement sufficient to satisfy its obligations under *Laidlaw*.

III.

The narrowness of our review of NLRB decisions is well-established in this circuit.

> We will defer to the Board's judgment and the Board's factual findings shall be conclusive if supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e). . . . This "court may not substitute its judgment for that of the Board when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.'" . . . We shall also defer to the Board's inferences in areas where the Board is considered to have 'specialized experience and expertise.'

NLRB v. Emsing, 872 F.2d 1279, 1283-84 (7th Cir. 1989) (citations omitted). This court must uphold the legal conclusions of the Board "unless they are irrational or inconsistent with the [Act]." *NLRB v. Parents and Friends of the Specialized Living Center*, 879 F.2d 1442, 1448 (7th Cir. 1989) (citing *NLRB v. Financial Institution Employees*, 475 U.S. 192, 202 (1986)). In conducting this review, however, we must look at the record in its entirety. *Emsing*, 872 F.2d at 1283; *NLRB v. Stor-Rite Metal Products, Inc.*, 856 F.2d 957, 964 (7th Cir. 1988). After reviewing the record in this light, we conclude that the ALJ's relevant factual findings, as adopted by the NLRB, are supported by substantial evidence, and affirm those findings. We now review the ALJ's legal conclusions.

A.

Section 152(3) of Title 29 states that persons considered "employees" entitled to the protections of the Act include any individual "whose work has ceased as a consequence of, or in connection with, any current labor dispute . . . and who has not obtained any other regular and substantially equivalent employment."[5] Based on this provision, the Supreme Court held in *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 381 (1967), that after a striker has made an unconditional offer to return to work, he is entitled to an offer of reinstatement "[i]f and when a job for which the striker is qualified becomes available." The court reasoned that if "after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and strike guaranteed by §§ 7 and 13 of the Act." *Id.* at 378.

Our first major application of the *Fleetwood Trailer* holding came in *Laidlaw*, 414 F.2d 99. In that case, we upheld an NLRB order which decided that an employer violated §§ 8(a)(1) and (3) by refusing to reinstate a striker after his permanent replacement left unless he agreed to give up his seniority and vacation rights, and by terminating strikers whose jobs were not available on the day they applied to return to work. We held that a striking employee has a right to full reinstatement, and this right cannot be conditioned on job availability on the day the employee unconditionally offers to return to work; an employer is thus obligated to offer reinstatement to the striking employee before

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[5] As stated above, Webb's argument is that the three individuals here were no longer "employees" within the protection of the Act, as it applies to the *Laidlaw* rights of striking employees, once they accepted the dryer-feeder position. In Webb's view, their failure to perform in that position justified their termination with no residual striker's rights.

hiring applicants who do not have the striking employee's continuing "employee" status under the Act. *Laidlaw*, 414 F.2d at 103.

Neither the Supreme Court in *Fleetwood Trailer* nor this court in *Laidlaw* defined the parameters of what action by an employer will constitute adequate reinstatement. Neither case discussed whether reinstating an employee to a different job with the company fulfilled the company's reinstatement obligation. Nor did the cases focus on whether the "substantially equivalent" language in § 152(3) referred only to jobs at another company or whether offering a substantially equivalent job at the reinstating company met the company's obligation. A few circuits, however, have begun the process of establishing guidelines for reviewing the adequacy of the reinstatements of striking employees. In *Arlington Hotel Co. v. NLRB*, 785 F.2d 249, 251 (8th Cir.), *cert. denied*, 479 U.S. 914 (1986), the Eighth Circuit held that under the circumstances of that case (where employees had been cross-trained for other positions) if a position is open for which the striker is qualified, but which is not the substantial equivalent of the employee's former position, the company must offer the job to the employee rather than restrict its reinstatement offer to the employee's former position. *See also NLRB v. American Olean Tile Co.*, 826 F.2d 1496, 1501 (6th Cir. 1987) (an employer is required to offer strikers available positions for which they are qualified even if such positions are not substantially equivalent to their pre-strike positions).

The Eighth and Ninth Circuits have specifically stated that employees must be reinstated to their prior or substantially equivalent positions before an employer's obligation is satisfied. *NLRB v. Rockwood & Co.*, 834 F.2d 837, 841-42 (9th Cir. 1987) ("because the glue tank cleaning job was not substantially

equivalent to [the employee's] former position, he was entitled to accept or reject it without affecting his status as an employee under Section 152(3) or his right to reinstatement"); *Medallion Kitchens, Inc. v. NLRB*, 811 F.2d 456, 459 (8th Cir. 1987) ("[a]bsent a substantial and legitimate business justification, an employer's obligation is satisfied only upon an offer to the former striker of a substantially equivalent job"). Other Circuits have given similarly broad interpretations to the reinstatement requirement. The Sixth Circuit has held that the positions of economic strikers may be filled by permanent replacements during the strike, but the strikers "retain the right to reinstatement in their jobs as soon as those jobs become available." *Kurz-Kasch, Inc. v. NLRB*, 865 F.2d 757, 759 (6th Cir. 1989). The Third Circuit has held that "[s]triking employees retain their status as employees and must be fully reinstated when a strike ends." *Hajoca Corp. v. NLRB*, 872 F.2d 1169, 1177 (3d Cir. 1989) (emphasis added) (citations omitted).

The question before us is whether, in order to fulfill its *Laidlaw* obligation, Webb must offer an economic striker the same job, a *substantially equivalent* job, or any job for which he or she is qualified. The ALJ and the Board determined that the recall job had to be substantially equivalent, if not the same as, the employee's pre-strike position. Webb argues that the "substantially equivalent" language in § 152(3) refers only to employment obtained elsewhere during the strike. The NLRB, in contrast, cites language from *Medallion Kitchens* that "an employer's obligation is satisfied only upon an offer to the former striker of a *substantially equivalent* job." 811 F.2d at 459 (emphasis added).

We are particularly deferential to the NLRB when interpreting the Labor Acts.

> When the Board's decision rests upon an interpretation of the Act, we will uphold the decision if it 'is an acceptable reading of the statutory language and a reasonable implementation of the purposes of the relevant statutory sections.'

Giddings & Lewis, Inc. v. NLRB, 675 F.2d 926, 928-29 (7th Cir. 1982) (citations omitted); *see also NLRB v. Transportation Management Corp.*, 462 U.S. 393, 402-03 (1983).

The NLRB has consistently taken the position that employers must reinstate striking employees to their former or substantially equivalent positions before the employer's *Laidlaw* obligations are satisfied. In *Providence Medical Center*, 243 NLRB 714, 744 (1979), the NLRB enforced an ALJ holding that an employer must "immediately" reinstate a striking employee to his previous or a substantially equivalent position as soon as such a position becomes available, and that the striker's acceptance of an interim lower-level position does not "extinguish" the employer's duty to offer substantially equivalent employment when it later becomes available. Recently, in *Ford Bros., Inc.*, 294 NLRB No. 10, at 7 (May 23, 1989), the NLRB ordered an employer to

> [i]mmediately reinstate all employees who were engaged in an economic strike against the Respondent . . . to their former positions, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or privileges previously enjoyed, and make those employees whole for any loss of wages or benefits that they sustained. . . .

This order was based on the ALJ's interpretation of the Act and the case law as placing the burden on the employer "of proving that the strikers' former positions or substantially equivalent

positions, were unavailable for legitimate and substantial business reasons." *Id.* at 51 of ALJ Decision.

Although the application of the "substantially equivalent" language may have expanded somewhat in the evolutionary process of the case law, such an application is not unreasonable. We therefore conclude that the NLRB's interpretation of the Act, *Fleetwood Trailer*, and *Laidlaw*, which requires reinstatement of a striking employee to his former or a substantially equivalent position, is consistent with the policies and the language of the Act, and with the case law thus far.[6]

Requiring employers to reinstate striking employees to the same position they held before the strike, or a substantially equivalent position, is consistent with the policies underlying

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[6]This holding is consistent with the approach of the Ninth Circuit in *NLRB v. Rockwood & Co.*, 834 F.2d 837, 841-42 (9th Cir. 1987) and the Eighth Circuit in *Medallion Kitchens, Inc. v. NLRB*, 811 F.2d 456, 459 (8th Cir. 1987). *See also Rockwood & Co.*, 281 NLRB 862, 877 (1986) ("a former economic striker is entitled to wait for reinstatement to a position 'substantially equivalent' to his prestrike position and . . . an employer violates Section 8(a)(3) and (1) of the Act by terminating such an individual's employment status, thereby ending his preferential reinstatement rights, for having refused an offer of a job that is not substantially equivalent"), *enforced*, 834 F.2d 837 (9th Cir. 1987); *Harvey Entering & Manufacturing Corp.*, 270 NLRB 1290, 1292 (1984) ("[a]n employer is obligated to accord economic strikers preferential status and to immediately reinstate them on application when their previous or substantially equivalent positions become available"); *H&F Binch Co.*, 188 NLRB 720, 725 (1971) (*Laidlaw* requires that the employer eventually offer striking employees "their old jobs or substantially equivalent ones," even where the employee has already accepted a lower paying position from the employer), *enforced*, 456 F.2d 357 (2d Cir. 1972).

the Act. One of the policies behind the Act was to protect the rights of the employees to organize and strike. *See, e.g., Fleetwood Trailer*, 389 U.S. at 378. Since "[t]he term 'employee' must be understood with reference to the purpose of the Act and the facts involved in the economic relationship," *Woodlawn Hospital v. NLRB*, 596 F.2d 1330, 1334 (7th Cir. 1979), we need to discern who is an employee entitled to protection under *Laidlaw* by determining whether excluding employees from the Act's protection would discourage labor from organizing and striking. We agree with the NLRB that employees will be deterred from striking if their employer can reinstate them to a lower-level position and thereby fulfill his obligations under Laidlaw. If lower-level positions are all that are available to an employee when he reaches the top of the recall list, he is likely to feel financial pressure (particularly alter a long strike where most vacancies were filled) to take the position rather than wait until a position substantially equivalent to his pre-strike job becomes available. However, if accepting a lesser job means he may lose his right to reinstatement to his previous position if he is unable to perform satisfactorily, his options are limited. To ensure that the striker is not penalized for engaging in protected activity, we conclude that under the policies behind the Act, the process of reinstatement does not end until the employee receives his original position or one substantially equivalent to it. But the right to return is not necessarily open-ended. The Board will ultimately have to determine the obligations of the employer and the rights of the employee while waiting for a vacancy in a substantially equivalent job.[7]

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[7]The Act is also concerned with the rights of the employer to run his business, and attempts to balance the respective rights of employers and employees. Webb argues that the NLRB order here interferes with his ability to discharge employees who are performing unsatis-

Footnote continued on next page

The theory behind *Fleetwood Trailer* and *Laidlaw* is that employees should not be penalized for striking, and that they remain employees regardless of such action. This logically extends to the employees' post-strike employment status, and protects the employees until they are sufficiently reinstated. *See Fleetwood Trailer*, 389 U.S. at 379; *see also id.* at 381 (Court holds that "the status of the striker as an employee continues until he has obtained 'other regular and substantially equivalent employment'"). "This basic right to jobs cannot depend upon job availability as of the moment when the applications are filed." *Id.* at 381. Likewise, a returning striker's right should not depend on the coincidence of which jobs may be open when he reaches the top of the recall list. If Webb had an opening in the employees' pre-strike jobs, or in substantially equivalent positions, when it placed the employees in the dryer-feeder position (or indeed any time before the employees were terminated from the dryer-feeder position), it would have had to offer them that position. Webb cannot now argue that because the employees chose to take the lower-level position that the company is discharged from the higher reinstatement requirement.

Laidlaw supports this interpretation. There, we held that strikers who are replaced by permanent employees "are entitled to *full* reinstatement upon departure of the replacements unless they have in the meantime acquired regular and substantially equivalent employment." 414 F.2d at 103 (emphasis added).

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factorily, a right we readily concede belongs to employers. We have previously recognized the "Congressional intent to preserve an employer's right to discipline conduct not protected by the Act." *Woodlawn Hospital*, 596 F.2d at 1335. As discussed above, however, we do not question Webb's act of discharging the employees from the dryer-feeder position.

Allowing the employee to retain his right to reinstatement until he receives substantially equivalent employment from another employer[8] is justified because his original employer should be held accountable until the employee is in a situation comparable to the one he was in before he exercised his right to strike; this certainly applies to the type of employment he should receive from his own employer as well.

Webb cites three cases which it claims are inconsistent with the NLRB's interpretation of the reinstatement requirement. The first is *Woodlawn Hospital*, 596 F.2d at 1330, where this circuit, in addressing the issue of who is an employee under the Act, stated that "strikers properly discharged for unprotected activity were not 'employees'," because their employment did not "cease in connection with a labor dispute" as required by 29 U.S.C. § 152(3), and therefore the Board could not order their reinstatement. *Id.* at 1335. In *Woodlawn Hospital*, we addressed an NLRB order of reinstatement to a position from which the employee was discharged. Here we are not questioning whether Webb validly discharged the three employees from the dryer-feeder position for incompetent performance. Rather, we are concerned with whether the employees were fully reinstated in the first place. When the employees accepted the lesser job of dryer-feeder, Webb removed them from the recall list and the possibility of reinstatement to their former or a substantially equivalent position. We conclude under these facts that such removal from the recall list violates the Act. The employees should maintain their "employee" status in relation to those positions, even though they were incompetent dryer-feeders.

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[8]Webb seems to concede that if the three employees had gone to a dryer-feeder position at another company and were terminated for cause, Webb would be required to recall them under *Laidlaw*.

Our holding does not immunize employees from discipline who are reinstated to positions not the substantial equivalent of their pre-strike positions. The only right they maintain that is not also held by newly hired employees in the same position is the right to eventually be reinstated to their former position or its substantial equivalent. Also, once the employees are fully reinstated to their former or substantially equivalent positions, Webb is not prevented from completely discharging them from those positions for their inability to perform the job or for other reasons constituting cause.

Webb complains that the NLRB order is inconsistent with the Eighth Circuit's decision in *Arlington Hotel*, 785 F.2d 249, where the court held that an employer (a hotel) who had a policy of cross-training its employees for several jobs, must offer a striking employee any available job for which he is qualified, rather than wait until his former or a substantially equivalent position becomes available. Without determining the scope of *Fleetwood Trailer*, the *Arlington Hotel* court held:

> Under the facts of this case, we find that the Board did not err in holding that the Hotel discriminated against the strikers by not offering them jobs for which they were qualified. The Hotel had a policy of cross-training and developing multiple capabilities for its employees.

785 F.2d at 251. Thus, since the cross-training policy qualified the employees for many jobs, they had a right to be reinstated to whichever of those openings first became available. While *Arlington Hotel* may be a starting point for determining the scope of protection for employees' *Laidlaw* rights, it certainly does not encompass the full extent of the employer's *Laidlaw* obligations.

Webb finally relies on *American Olean Tile*, 826 F.2d 1496, which involved a dispute over the order of recall for two plants which were struck by their employees. The Sixth Circuit there held that striking employees are considered reinstated upon their return to the company, even when the reinstatement is to a position that is not the substantial equivalent of the pre-strike position, and that their later transfer to their former or substantially similar jobs merely "completed the process." *Id.* at 1501. However, the court made that statement in a very different context than the one before us now; there, employees who were "reinstated" to positions not substantially equivalent to their pre-strike positions were being compared to those still on the recall list to determine who should fill vacancies that subsequently arose. The employees placed in the lower-level positions were "reinstated" in relation to those still on the recall list, but the court recognized that these reinstated employees had not yet received the substantially equivalent positions to which they were entitled. Thus, the Sixth Circuit's holding does not suggest that the employer could terminate the employees' right to eventually receive their former or substantially equivalent positions if they proved unable to perform the positions to which they were initially reinstated.[9]

Moreover, Webb's position that its recall obligation is fulfilled once a striker accepts any job for which he is qualified

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[9]The court in *American Olean Tile* also stated that an *offer* of a position for which the striking employee is qualified, even if that position is not the substantial equivalent of the employee's prestrike position, satisfies the employer's obligations under *Laidlaw*. Webb expressly refused to argue such a position to this court, and our holding that the actual acceptance of such an offer does not abort the employee's *Laidlaw* rights obviously rejects a mere offer as being sufficient.

places economic strikers in a potentially job-fatal situation. Allowing the employer to satisfy its *Laidlaw* obligation by offering a striker a position which is not one the striker is best able to perform (in contrast to his prestrike position) could allow a system which forces the striker to accept a position at which he is predestined to fail and thus lose his original *Laidlaw* rights in the process. This is the type of situation against which the Act was designed to protect striking employees, since returning from a strike to such a precarious situation adversely affects the employee's right to strike and organize in the first place.

We uphold the NLRB's determination that an employee retains his right to reinstatement until he receives the same job or one substantially equivalent to it (assuming he does not accept a substantially equivalent job elsewhere) even if in the interim he accepts a lesser or different position from his employer. But as we stated earlier, we do not perceive this right to be open-ended. Additional factual variations will present related questions. At some point the Board will need to decide whether an employer must more than once offer a striking employee an available lesser position pending the opening of a substantially equivalent job. The employee's position on the recall list will also be a factor. Although these extended questions are a concern to both the employer and employee, they are not specifically before us now, and until the NLRB has had an opportunity to rule on these issues, we need not take a definitive position.

B.

Having held that striking employees must be reinstated to their former or a substantially equivalent position, we can only refuse enforcement of the NLRB order if Webb shows a legitimate and substantial business justification for removing the employees from the recall list and refusing to place them in

their former or substantially equivalent positions when such became available. *Fleetwood Trailer*, 389 U.S. at 378. As the Supreme Court stated in *Fleetwood Trailer*,

> unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of unfair labor practices. . . . It is the primary responsibility of the Board and not of the courts 'to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.'

Id. (citations omitted).[10] The burden of establishing this justification is on the employer. *Id.*; *Kurz-Kasch*, 865 F.2d at 759. We find that Webb has failed to meet this burden.

Webb argues that it has a legitimate reason for terminating employees from positions they are unable to perform. We do not take issue with that proposition. The failure to adequately perform the dryer-feeder job was cause for termination from that position, as the NLRB stated. However, it was not a sufficient reason for removing the employees from the eligibility list for their prestrike positions or their substantial equivalent.

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[10]The Court gave two examples of possible legitimate and substantial business justifications for an employer's refusal to reinstate a striking employee: (1) permanent employees were hired during the strike to continue normal business operations, and these employees remain in the positions at issue, and (2) the striker's job was eliminated for substantial and bona fide reasons. *Fleetwood Trailer*, 389 U.S. at 379. Neither justification is present here.

Webb also argues that it has a legitimate business reason for subjecting the striking employees to the same disciplinary standards as newly hired workers. Again, nothing in our holding suggests that the three employees here could not be disciplined or dismissed from the dryer-feeder position for the same reasons other newly hired employees could be similarly disciplined. However, because the three employees here possessed residual *Laidlaw* rights to full reinstatement, Webb could not refuse to offer them their pre-strike positions or their substantial equivalent when such vacancies arose. In sum, since all of Webb's arguments address its reasons for terminating the employees from the dryer-feeder position, and not reasons for terminating them from the recall list and their full reinstatement rights, we do not believe it has offered a valid defense of a legitimate and substantial business justification for its actions.

Webb also focuses on the ALJ's finding that it exhibited no anti-union animus. But such a finding is only relevant if the employer has already shown a legitimate and substantial business justification; there can be a violation of the Act by an employer's action that is destructive to the rights of the striking employee even if the employer does not possess anti-union sentiment. *Fleetwood Trailer*, 389 U.S. at 380; *Kurz-Kasch*, 865 F.2d at 759; *Woodlawn Hospital*, 596 F.2d at 1333.

> [P]roof of antiunion motivation is unnecessary when the employer's conduct 'could have adversely affected employee rights to some extent' and when the employer does not meet his burden of establishing 'that it was motivated by legitimate objectives.'

Fleetwood Trailer, 389 U.S. at 380 (quoting *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967)). The Court went on to hold that an employer's refusal to reinstate striking employees

is "destructive of important employee rights," and that where the employer "has not shown 'legitimate and substantial business justifications,' the conduct constitutes an unfair labor practice without reference to intent." *Id.* at 380. Because Webb has refused to reinstate the three striking employees, and because we, like the ALJ, have found that it has not offered a legitimate and substantial business reason for this refusal, the ALJ need not have found any anti-union sentiments by Webb to find a violation of the Act.

C.

The record below shows that Hill's pre-strike position as a labeler and Young's pre-strike position as a flitch cleaner became vacant after each was terminated from the dryer-feeder position, and that these positions were subsequently filled by employees with less seniority than either Hill or Young. The NLRB's order therefore properly directed that these two employees be reinstated to their pre-strike positions. As for McGaha, the ALJ found, and this finding is not contradicted by the record, that the permanent replacement in McGaha's pre-strike truck driver/fork-lift operator job remained in that position at the time of the administrative hearing, but that there was evidence that other fork-lift operator and related positions became available and were filled by employees with less seniority than McGaha. Under the NLRB's order, if McGaha's original position has in the meantime opened up, then Webb must reinstate McGaha to that position. If the position remains filled by the permanent replacement, Webb must reinstate McGaha to a substantially equivalent position, which the record suggests may exist. If for some reason no substantially equivalent position had become available since McGaha's acceptance of the dryer-feeder position, he is entitled to be placed back on the recall

list until such a vacancy arises. The failure of the ALJ to definitively find that a position substantially equivalent to McGaha's pre-strike position had become available at Webb, and our lack of knowledge as to whether McGaha's former position or a substantially equivalent position has become available since the ALJ's decision, does not prevent us from enforcing the Board's order. This is an issue that can easily be decided by the Board or the ALJ at a later compliance proceeding. *See NLRB v. Sure-Tan*, Inc., 672 F.2d 592, 602 (7th Cir. 1982) (enforcing NLRB decision which left for the compliance proceeding the determination as to the availability of work)."[11]

D.

Finally, we hold that enforcing the Board's order of reinstatement does not violate 29 U.S.C. § 160(c). That section provides that when the Board finds an employer has engaged in an unfair labor practice, the Board shall "take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter." As previously noted by this court, "the Board is given substantial discretion in the reinstatement of 'employees'." *Woodlawn Hospital*, 596 F.2d at 1335. Section 160(c) goes on to state, however, that

> [n]o order of the Board shall require the reinstatement of any individual as an employee who has been

[11]Similarly, we need not define here what would constitute a substantially equivalent position to McGaha's pre-strike position, since that is the type of issue best suited for first determination by the ALJ and the NLRB, with their expertise in this area and their ability to develop a sufficient factual record to make such a determination. Moreover, there are many potential scenarios in this and future cases that we need not address in this case.

> suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

We read this statute as prohibiting the Board from ordering employees reinstated to the positions from which they were discharged. Webb's argument that Section 160(c) bars reinstatement here is based on its mistaken assumption that the three employees had been sufficiently reinstated at the time of their discharge from the dryer-feeder position, and that they had lost their status as "employees" under the Act. It is true that once the employees are fully reinstated to their former or substantially equivalent positions, Webb has the right to discharge them for any legal reason. *See, e.g., Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 189 n.10 (1973). The NLRB's order in this case, however, directs reinstatement to the employees' pre-strike positions or the substantial equivalent of those positions, and these are positions for which the employees' inability to perform in the lower-level positions is not related. It was not the discharge from the dryer-feeder position that constituted the unfair labor practice, but rather the termination of the employees' *Laidlaw* rights by removing them from the recall list and refusing to reinstate them to their former or substantially equivalent positions. Had the Board ordered reinstatement to the dryer-feeder position, § 160(c) would effectively prohibit such reinstatement. Because Webb did not have "cause" to terminate the three employees from the recall list and their right to eventual reinstatement to their pre-strike position or its substantial equivalent, the Board can order reinstatement as a remedy for that violation of Sections 8(a)(1) and (3). *Woodlawn Hospital*, 596 F.2d at 1344 (recognizing that where the Board properly finds a violation of the Act, it can order reinstatement under its remedial powers granted by § 160(c), although finding no violation of the Act here).

IV.

In sum, we uphold the determination of the ALJ and the NLRB that Webb violated Sections 8(a)(1) and (3) of the Act by terminating the three employees from the recall list before offering them reinstatement to their pre-strike or substantially equivalent positions, and failing to offer a legitimate and substantial business reason for such termination. The petition for review of the NLRB order is denied, and the NLRB's cross-application for enforcement of the order is granted.

ENFORCEMENT GRANTED.

A true Copy:

Teste:

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Clerk of the United States Court of
Appeals for the Seventh Circuit

SJC

291 NLRB No. 36

D--9160
Edinburgh, IN

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DAVID R. WEBB CO., INC.

and

Case 25--CA--18553

EUGENE McGAHA, an Individual

DECISION AND ORDER

On June 8, 1988, Administrative Law Judge Donald R. Holley issued the attached decision. The Respondent filed exceptions and a supporting brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions [3] and to adopt the recommended Order.

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[1]The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2]In sec. III, A, par. 14, of his decision the judge referred to John Coleman. The correct spelling of this supervisor's name is Coffman.

The Respondent excepted to the judge's finding that employee Eugene McGaha testified that he told Coffman that his disability might

Footnote continued on next page

D--9160

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, David R. Webb Co., Inc., Edinburgh, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. September 30, 1988

James H. Stephens, Chairman

Wilford W. Johansen, Member

Mary Miller Cracraft, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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prevent him from performing the dryer feeder job. We do not rely on this finding that we conclude is not fully supported by the record. However, this does not affect the result in this case.

[3]In affirming the judge, we note that given the poor performance of Hill, Young, and McGaha in the position of feeder on the #2 vacuum dryer, the Respondent was not obliged to retain these employees in that position. However, we agree with the judge that the employees' performance in that position, which was not substantially equivalent to their prestrike positions, could not provide a basis for the Respondent's failure to continue to extend to these employees their *Laidlaw* rights.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DAVID R. WEBB CO., INC.

and Case 25--CA--18553

EUGENE McGAHA

Walter Steele, Esq., counsel for
the General Counsel.
Jack H. Rogers, Esq. (Barnes & Thornburg),
of Indianapolis, IN, for Respondent.
Eugene McGaha, Pro Se, of Nineveh, IN,
for Charging Party.

DECISION

Statement of the Case

DONALD R. HOLLEY, Administrative Law Judge: Upon an original charge filed in the above-captioned case Eugene McGaha, an individual, on March 17, 1987, the Regional Director for Region 25 of the National Labor Relations Board issued a Complaint against David R. Webb Co., Inc. (herein called Respondent) on June 25, 1987, alleging, in substance, that by rehiring economic strikers Alice Hill, Rex Young, and Eugene McGaha in jobs other than their former or substantially equivalent jobs and thereafter terminating their employment, when they were unable to perform the job to which they had been recalled, Respondent violated Section 8(a) (1) and (3) of the National Labor Relations Act. Respondent filed timely Answer denying it had engaged in the unfair labor practices alleged in the Complaint.

The case was heard in Indianapolis, Indiana, on September 28 and 29, 1987. All parties appeared and were afforded full opportunity to participate. Upon the entire record, and after careful consideration of post-hearing briefs filed by the parties, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, a Delaware corporation, maintains its principal office and place of business in Edinburgh, Indiana, where it is engaged in the manufacture, sale and distribution of wood veneer and related products. During the 12-month period preceding June 25, 1987, it, in the course and conduct of its business operations, sold and shipped products, goods, and materials valued in excess of $50,000 to customers located outside the State of Indiana. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Status of Labor Organization

It is admitted, and I find, that Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 135, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called Teamsters Local 135) is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *Facts*

Respondent manufactures wood veneer and other wood products at its Edinburgh, Indiana, facility. It employs approximately 400 employees. Some 260 employees were in the bargaining unit represented by Teamsters Local 135 in 1986.

On July 28 of that year, the bargaining unit employees commenced what is conceded to have been an economic strike. On November 3, 1986, the striking employees, through the Union, offered unconditionally to return to work.

During the course of the strike, Respondent hired numerous replacements and a number of striking employees abandoned the strike and returned to work. After the strike ended, Respondent, without union participation, promulgated a plan for recall of striking employees for whom no jobs were available immediately. The plan involved creation of a preferential hiring list from which employees would first be recalled according to qualifications and seniority in their pre-strike department. After all jobs in all departments were filled, the recall was accomplished by consideration of qualifications of employees and their total length of service with the Company.[1]

By mid-February 1987, only 20-30 employees remained on the preferential hiring list. Alleged discriminatees Alice Hill, Rex Young, and Eugene McGaha were concedely the three employees on the list with the most plantwide seniority.

At some unstated time prior to February 17, Respondent Personnel Manager, Charles Kilpatrick, contacted employee Hill to offer her the job of operator of #2 vacuum dryer on the second shift. The position had been upgraded from a labor grade 1 job to a labor grade 2 job during the strike, and it paid $6.09 per hour. Hill accepted the job offer and reported for work at 3:30 p m. on February 17. She was terminated at the end of her shift on February 17, under conditions set forth, *infra*.

Hill was not called as a witness by either of the parties during the hearing. Through the testimony of Kilpatrick, it

[1]The validity of the recall procedure is not at issue in this case.

was established that Hill was approaching the age of 62 at the time of the hearing, and she is 4' 11" tall. For approximately 3-4 years prior to the strike, she had been employed in a labor grade 1 job on the first shift. The precise job was that of labeler in the export clipping and measuring department. In that job, she removed bundles of veneer from a conveyor, attached a label to the bundle, and placed the bundle on a different conveyor. The job required no heavy lifting or eye-hand coordination, as the bundles were simply shoved from one conveyor to another. It paid $5.91 per hour when the strike began, but was upgraded to a labor grade 2 job during the strike. Kilpatrick indicated that, during her 12-13 year tenure with Respondent, Hill had performed some unspecified job in the dryer department, had performed a second veneer handler job in the export clipping and measuring department which involved moving sheets of veneer, with the assistance of another employee, from one conveyor to a second conveyor some 3-4 feet distant, and had been tried in a lay-up job but had been disqualified from it.[2]

A video tape which depicts the functions performed by the feeder of the #2 vacuum dryer was placed in the record as Respondent Exhibit 1. Briefly, the job consists of placing a quantity of wood veneer on a scissors lift with the aid of a conveyor, elevation of the scissors lift through use of a foot pedal or button to the height of 4' to 4½', and flipping individual sheets of veneer upward with the fingers to permit a vacuum to grab the individual sheets and affix them to a belt which moves through the dryer.

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[2]When Hill was disqualified on the lay-up job when she was unable to perform it, she was transferred to other work.

Jerry Thompson, the supervisor of Respondent's second shift, testified that when Hill reported for work on February 17, he briefed her on her starting time, breaktime, punch in procedure, and directed her to the #2 vacuum dryer where he explained and then demonstrated the job she was to perform. He indicated he noted things were not going smoothly when she began to perform, and sought to improve her situation by constructing a platform for her to stand on to compensate for her lack of height. Thompson testified Hill experienced difficulty with virtually every aspect of the job during the shift. He stated she was not efficiently loading the scissors lift and she was unable to efficiently feed the machine. He indicated her failure to properly feed the machine caused sheets of veneer to fall to the floor, and resulted in the discard of product at the other end of the machine because sheets of veneer came out folded. Thompson claimed he had never seen an employee perform as poorly on the machine, and he indicated he reported Hill's deficiencies to the plant manager and to Kilpatrick.

At the end of her shift on February 17, Hill was instructed to report to Kilpatrick. When she did, he told her her performance was not satisfactory and something would have to be done. Kilpatrick testified Hill then told him she did not like the job and would rather stay at home with her husband and collect unemployment until she was eligible to retire (at age 62). Kilpatrick informed her Respondent would replace her and it would not object to her drawing unemployment. He admits Hill was then terminated.

On February 18, Kilpatrick contacted Rex Young, then the employee with the greatest plantwide seniority on the preferential hiring list, and offered him the position of feeder on the #2 vacuum dryer on the second shift. Young accepted the job offer and agreed to report that afternoon at 3:30 p.m.

Young testified he was hired by Respondent on February 10, 1975. His first job was that of flitch hanger.[3] In that job, which he held for 3-4 years, he hand-cleaned flitches with a hand planer. He next worked for 3-4 years marking samples and measuring veneer. In that job, he received logs from the vat area and affixed tickets to them which indicated the number of board feet in each flitch. After he was disqualified in the above-described job, he was transferred back to the vat department where he performed the flitch cleaner job during the 2-3 years which preceded the strike. As a flitch cleaner, he, with the assistance of a second employee, placed flitches on a chain which acted as a conveyor and moved flitches through a washer which resembled a carwash. Young worked on the first shift immediately prior to the strike, and he earned $6.02 per hour in his labor grade 3 position.

Thompson testified that when Young reported for work on February 18, he briefed him just as he had briefed Hill the afternoon before, and he then acquainted Young with the manner in which he was to feed the #2 vacuum dryer. He testified Young loaded the scissors lift efficiently, but experienced difficulty in feeding the machine. He indicated that Young, like Hill, improperly fed the machine and as a result a lot of sheets were discarded. Thompson testified Young continued to remain inefficient in feeding the machine on February 19 and there were many discarded sheets and a lot of starting and stopping of the machine to straighten up the messes which resulted from improper feeding. Thompson reported his observations of Young's performance to Kilpatrick, and told the employee to contact Kilpatrick at 1 p.m. the next day. When Young reached Kilpatrick by phone at 2 p.m. the next day,

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[3]When a log is split in half, in quarters, or otherwise, each individual piece is called a flitch.

Kilpatrick terminated his employment, indicating he could draw unemployment.

On Friday, February 20, Kilpatrick contacted Eugene McGaha and offered him the feeder job on #2 dryer on the second shift. McGaha asked if Kilpatrick thought he could perform the work and Kilpatrick assured him he could.[4]

McGaha was hired by Respondent in 1975. He worked in the maintenance department for 3-4 years repairing, tuning and servicing towmotors and/or forklifts. After working on the machines, he tested them. Throughout his employment, he drove a forklift about once a month to unload and warehouse acid delivered to the facility. During the 7 years preceding the strike, he was classified as a truckdriver. He drove a pickup truck and flatbed truck. McGaha indicated he also substituted for the clerk in the toolroom of the maintenance department while driving a truck. In that job, he checked tools in and out. He was a licensed driver and possessed a company license to drive a forklift. As a driver, he worked the first shift and was paid $6.90 per hour in his labor grade 7 position.

Thompson testified that when McGaha reported for work on Monday, February 23, he briefed him and demonstrated how the feeder job on the #2 vacuum dryer was to be accomplished. He indicated that McGaha, like Hill, experienced difficulty loading the scissors lift and experienced difficulty when feeding the dryer. Thompson claimed he went to the #2 vacuum dryer repeatedly to explain, demonstrate, re-explain, and redemonstrate the job, but McGaha just could not or would not do the job. McGaha testified his left arm was 15-20 percent

[4]McGaha testified he had surgery on his left arm about a year before the hearing and he claimed Kilpatrick was aware the arm was 15-20 percent disabled.

disabled and he called John Coleman, his former supervisor in the maintenance department, on Tuesday to ask if they were setting him up to fire him, indicating his disability may not permit him to perform the dryer feeder job. He testified Coleman said he would call him back, but he never did. When McGaha reported for work on Wednesday, February 25, he was told he was to see Kilpatrick. When he went to the latter's office, Kilpatrick terminated him, indicating he could draw unemployment.

While interrogating Kilpatrick as an adverse witness, counsel for Ceneral Counsel caused Kilpatrick to review information in the personnel files of approximately 34 employees. In the process, he established, *inter alia*, that employee Cindy Jackson was in Hill's job when the strike ended and that employee Cindy Burton, who had less seniority than Hill, was given Hill's pre-strike job after Hill was terminated on February 18, 1987. Similarly, the record revealed openings in Young's pre-strike job of flitch cleaner were filled by employees Howard Tutor, Jeff Taylor, and Jackie Jackson on April 22, May 9, and July 22, 1987, respectively.[5] Finally, although the records revealed that employee Larry McCallum, who was in McGaha's pre-strike truckdriver job when the strike ended, remains in that job, counsel for Ceneral Counsel sought to show that certain forklift and/or related jobs which McGaha could arguably perform were awarded to employees with less seniority than McGaha after he was terminated in February 1987.

In support of its claim that Hill, Young and McGaha performed poorly on the #2 vacuum dryer job, Respondent placed in evidence as its exhibits 2 through 13, portions of personnel files of employees and production records to show that other

[5]The named employees were all junior in service to Young.

employees, including persons allegedly placed on vacuum dryers for the first time, experienced better production than the alleged discriminatees. I have reviewed each of the exhibits and see no need to analyze them at length here. Suffice it to say they reveal that other employees placed on the #2 dryer feeder experienced significantly higher production than Hill, McGaha, and Young.[6]

Analysis and Conclusions

General Counsel's contention in the instant case is that the alleged discriminatees, as economic strikers, were entitled, by virtue of *The Laidlaw Corporation*, 171 NLRB 1366 (1968), to their pre-strike jobs, or to substantially equivalent jobs, when vacancies occurred, and that Respondent could not lawfully deprive them of such right by recalling them to jobs they could not perform and thereafter terminating them.

On the other hand, Respondent contends that, when economic strikers accept recall to jobs other than their pre-strike jobs, they enjoy no exemption from uniformly applicable conditions of work and forfeit their right to future recall to their pre-strike jobs or substantially equivalent jobs if they are unable to perform the jobs they accept and are terminated for that reason.

In *The Laidlaw Corporation*, *supra*, the Board held (p.p. 1369-1370):

> . . . that economic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; and (2) are entitled to full reinstatement upon the departure

[6]Young's statistics were markedly higher than those of Hill and McGaha.

> of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.

If an employer fails to sustain his burden of proof, a refusal to reinstate employees after an economic strike constitutes an unfair labor practice notwithstanding the absence of animus or bad faith for such conduct ". . . discourages employees from exercising their rights to organize and to strike guaranteed by Section 7 and 13 of the Act. . . ." *Fleetwood Trailers Co.*, 389 U.S. 375, 378 (1967).

Although Respondent stressed the fact that the dryer feeder job to which the alleged discriminatees were all recalled was a so-called entry level job, which individuals with no training should be able to perform, it does not contend the alleged discriminatees were recalled to jobs which were substantially equivalent to their pre-strike positions. Indeed, I would reject such a contention if it were advanced. Thus, the record reveals Young worked in a labor grade 3 job prior to the strike and McGaha worked in a labor grade 7 job prior to the strike. All three alleged discriminatees worked the first shift prior to the strike. In the circumstances described, the dryer feeder job on the second shift did not constitute substantially equivalent employment for any of the alleged discriminatees. *H & F Binch Co.*, 188 NLRB 720, 724-725 (1971); *Providence Medical Center*, 243 NLRB 714, 744 (1979).

Remaining for resolution then is whether Respondent has shown that its failure to offer the alleged discriminatees full reinstatement was for legitimate and substantial business reasons. Respondent contends that it was legally obligated to offer the alleged discriminatees the feeder position, and, that

once they accepted the position, it was legally entitled to treat them like it would any employee placed in the job under discussion. Explaining that when employees are placed on jobs they cannot perform efficiently, employees are uniformly transferred or terminated, it claims it lawfully terminated the alleged discriminates.

My review of *Laidlaw* and its progeny fails to reveal a situation wherein the Board has decided the precise issue posed by Respondent. Respondent claims, however, that the issue was decided in its favor in *Weyerhaeuser Co.*, 274 NLRB 972 (1985), and *Lehigh Metal Fabricators, Inc.*, 267 NLRB 568 (1983). In point of fact, it relies upon dicta set forth in those decisions by Judge Harmatz. Thus, in *Weyerhaeuser*, *supra*, at page 974, the Judge stated:

> Under the Act, strikers are to be treated in the same fashion upon their unconditional offer to return to work as would have been the case had they not participated in a strike. Absent specific evidence of antiunion motivation, economic strikers are entitled to no more or no less. They enjoy no exception from uniformly applicable conditions of work, which are unrelated to strike activity and which fail to prejudice the strikers on the basis of worktime lost due to participation in a strike.

In *Lehigh*, *supra*, at page 575, he stated:

> . . . employer misgivings concerning the qualifications of an economic striker are to be tested on the job through recall, with the employer, later, permitted to take appropriate action if the recalled striker is in fact "unqualified or cannot do the work."

While the above-quoted comments were appropriately set forth in *Weyerhaeuser* and *Lehigh Metal*, neither case stands for

the proposition that an employer can extinguish an economic striker's right to his or her pre-strike job or to substantially equivalent position by offering the striker a job which he or she cannot perform and thereafter terminating the striker's employee status for failure to perform adequately. Instead, in *Weyerhaeuser* the issue involved the rights of economic strikers versus the rights of nonstrikers in a situation wherein a plant had been closed so long that nonstriking employees' contractual recall rights had expired and the issue was whether economic strikers enjoyed superior recall rights when the plant reopened merely because they had engaged in a strike. On the other hand, the issue in *Lehigh Metal* whether economic strikers could be deprived recall because employer's subjective view was that they would be unable to perform available work because of changes in the skill level of such work.

Patently, the above-quoted remarks extracted from *Weyerhaeuser* and *Lehigh* were made in a context wherein the right of economic strikers to their pre-strike jobs was under discussion. The comments are clearly inapplicable here where recall was to a lesser job which was not substantially equivalent to the pre-strike jobs held by the alleged discriminatees.

There may conceivably be circumstances in which an employer would be justified in terminating an economic striker who had been recalled to a job other than his or her pre-strike position, but the facts in the instant case fail to establish that Respondent terminated Hill, Young and McGaha for legitimate and substantial business reasons. The reason assigned for the termination of each of the employees was failure to perform the dryer feeder job to Respondent's satisfaction. Respondent concedes the employees could have refused recall to the job under discussion without losing their employee status. Moreover, it is clear that by accepting and subsequently leaving a job that

was not substantially equivalent to their pre-strike positions at an employer other than Respondent, the employees would have retained their status as Respondent employees, and they would have been entitled to their pre-strike positions when they available. In the circumstances described, I find Respondent has failed to sustain its burden of proving that Hill, Young, and McGaha were deprived of their right to full reinstatement for legitimate and substantial business reasons.

While I have rejected Respondent's contention that it could, in effect, treat the alleged discriminatees as new employees in the factual situation presented, I note the instant record affirmatively reveals Respondent treated the alleged discriminatees discriminatorily. Thus, as noted, *supra*, the record reveals that, during the period preceding the strike, both Hill and Young were assigned to jobs which they failed to perform satisfactorily. They were disqualified on those jobs and were thereafter transferred to work which they could perform. Obviously, Hill and Young were treated differently in February 1987, and no explanation was offered for what would appear to be a failure by Respondent to follow its past practice when regular employees were placed on jobs they were unable to perform. While McGaha was not shown to have been disqualified on any job prior to the strike, he testified he was partially disabled when he was recalled to the dryer feeder job and he claims be told supervisor Coleman his disability might prevent him from performing the dryer feeder job. Additionally, McGaha claimed Kilpatrick was aware of his disability. In the circumstances described, it would appear Respondent was aware McGaha would be unable to perform the dryer feeder job to supervision's satisfaction. The fact that McGaha was the third person recalled to the job after two recalled strikers had failed to satisfactorily perform lends substance to McGaha's assertion

to supervision that he was being "set up" when he was recalled to the dryer feeder job.

In sum, I find that, in the circumstances presented in the instant case, Respondent did not fulfill its *Laidlaw* obligations by recalling the alleged discriminatees to jobs that were not substantially equivalent to their pre-strike jobs and terminating them when they vere unable to perform satisfactorily. I find, as alleged, that by terminating the employment status of Hill, Young and McGaha on February 17, 19 and 25, 1987, respectively, and thereby terminating their preferential recall rights, Respondent violated Section 8(a) (3) and (1) of the Act.

Conclusions of Law

1. David R. Webb Co., Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Teamsters Local 135 is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the unlawful acts described in section III above, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a) (3) and (1) of the Act.

4. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, it shall be recommended that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discriminated against Alice Hill, Rex Young and Eugene McGaha by terminating their employment status and preferential recall rights, and having found that the pre-strike positions held by Hill and Young became vacant after Respondent engaged in the unlawful conduct described, I shall recommend that Respondent offer Hill and Young immediate and full reinstatement to their pre-strike positions without prejudice to their seniority and other rights and privileges. As the record fails to reveal that McGaha's pre-strike position became vacant prior to the time the hearing was held in this case, I shall recommend that Respondent be required to offer McGaha immediate and full reinstatement to his pre-strike position if a vacancy in such position has occurred since the hearing herein was held, without prejudice to his seniority and other rights and privileges. If no such vacancy has occurred in McGaha's pre-strike position, I recommend Respondent be required to offer him immediate and full reinstatement to a substantially equivalent position of employment. Respondent will be required to make each of the alleged discriminatees whole for any loss of pay they suffered as a result of the discrimination practiced against them from the date they should have been reinstated to the date of valid offers of reinstatement. The date McGaha should have been offered reinstatement shall he left for resolution at the compliance stage of this proceeding. Loss of backpay and interest shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB No. 181 (1987).[7]

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[7]See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). In accordance with the decision in *New Horizons for the Retarded*, interest shall he computed at the "short-term Federal rate," interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in

Footnote continued on next page

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in this proceeding, I hereby issue the following recommended:[8]

ORDER

The Respondent, David R. Webb Co., Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Recalling economic strikers to jobs that are not substantially equivalent to their pre-strike positions and terminating their employment status and preferential recall rights when they are unable to perform the jobs to which they are recalled.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following action which is necessary to effectuate the policies of the Act:

(a) Offer Alice Hill and Rex Young immediate and full reinstatement to their pre-strike positions of employment and offer Eugene McGaha immediate and full reinstatement to

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the 1987 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[8]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

either his pre-strike position or to a substantially equivalent position of employment, in each case, without prejudice to the employee's seniority or other rights and privileges, and make them whole for the discrimination practiced against them in the manner set forth in the section of this decision entitled "The Remedy."

(b) Expunge from its files all reference to the discharges of Alice Hill, Rex Young and Eugene McGaha, and inform the named employees that such records will not be used as the basis for future action against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payments records, time cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Edinburgh, Indiana, facility copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms [sic] Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by

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[9]If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) [sic] Notify the Regional Director for Region 25, in writing, within 20 days from the date of the receipt of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. June 8, 1988

Donald R. Holley
Administrative Law Judge

APPENDIX

NOTICE TO ALL EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT recall economic strikers to jobs that are not substantially equivalent to their pre-strike positions and terminate their employment status and preferential recall rights when they are unable to perform the jobs to which they are recalled.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer Alice Hill and Rex Young immediate and full reinstatement to their pre-strike positions of employment and offer Eugene McGaha immediate and full reinstatement to either his pre-strike position or to a substantially equivalent position of employment, in each case, without prejudice to the employee's seniority or other rights and privileges, and make them whole for the discrimination practiced against them in the manner set forth in the section of this decision entitled "The Remedy."

WE WILL expunge from our files all reference to the discharges of Alice Hill, Rex Young and Eugene McGaha, and inform the named employees that such records will not be used as the basis for future action against them.

DAVID R. WEBB CO., INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Minton-Capehart Federal Building, Room 238, 575 North Pennsylvania Street, Indianapolis, IN 46204, Telephone 317-269-7413.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 7, 1989

Before

Hon. RICHARD A. POSNER, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

DAVID R. WEBB COMPANY, INCORPORATED, Petitioner-Cross-Respondent, Nos. 88-3204 and 88-3344	Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.
NATIONAL LABOR RELATIONS BOARD, Respondent-Cross-Petitioner.	No. 25-CA-18553

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by petitioner-cross-respondent, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

STATUTES INVOLVED

(1) National Labor Relations Act, § 2(3), 29 U.S.C. § 152(3).

When used in this subchapter -

* * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined. July 5, 1935, c. 372, § 2, 49 Stat. 450; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 137.

* * *

(2) National Labor Relations Act § 7, 29 U.S.C. § 157.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employ-

ment as authorized in section 158(a)(3) of this title. July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.

(3) National Labor Relations Act §§ 8(a)(1) and 8(a)(3), 29 U.S.C. §§ 158(a)(1) and 158(a)(3).

(a) It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believ-

ing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534 § 1(b), 65 Stat. 601; Sept. 14, 1959, Pub. L. 86-257, Title II, § 201(e), Title VII, §§ 704(a)-(c), 705 (a), 73 Stat. 525, 542, 545.

* * *

(4) National Labor Relations Act §§ 10(c) and 10(e), 29 U.S.C. §§ 160(c) and 160(e).

* * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint

shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge; or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed. July 5, 1935, c. 372, § 10, 49 Stat. 453; June 25, 1936, c. 804, 49 Stat. 1921; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 146; June 25, 1948, c. 646, § 32(a), (b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107, Aug. 28, 1958, Pub.L. 85-791, § 13, 72 Stat. 945; Sept. 14, 1959, Pub.L. 86-257, Title VII, §§ 704(D), 706, 73 Stat. 544. (As amended Mar. 27, 1978, Pub.L. 95-251, § 3, 92 Stat. 184; Nov. 8, 1984, Pub.L. 98-620, Title IV, § 402(31), 98 Stat. 3360.)

No. 89-1371

FILED
MAY 2
JOSEPH F. SPANIOL, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

DAVID R. WEBB COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Board reasonably concluded that, in the circumstances of this case, petitioner was obligated to reinstate economic strikers to positions substantially equivalent to those they had held before the strike, when petitioner had earlier rehired those employees in a lower-level position and then discharged them because of deficiencies in their performance in that position.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 888 F.2d 501. The decision and order of the National Labor Relations Board (Pet. App. 23a-24a), including the decision of the administrative law judge (Pet. App. 25a-44a), is reported at 291 N.L.R.B. No. 36.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1989. A petition for rehearing was denied on December 7, 1989 (Pet. App. 45a). The petition for a writ of certiorari was filed on February 27, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner manufactures and sells lumber products. On July 28, 1986, petitioner's production and maintenance employees began an economic strike. On November 3, 1986, the employees who remained on strike unconditionally offered to return to work. By then, many of their positions had been filled by permanent replacements, and unreinstated strikers were placed on a preferential recall list, arranged according to qualifications and seniority. Pet. App. 2a, 26a-27a.

By mid-February 1987, former strikers Alice Hill, Rex Young, and Eugene McGaha had reached the top of the list. At that time, neither their pre-strike jobs nor substantially equivalent jobs were available. Petitioner offered Hill an entry level position, which she accepted, as a "dryer-feeder" operator on the second shift. Hill reported to work on February 17. She immediately experienced difficulty in performing the work, and continued to be unsuccessful after a supervisor had a platform constructed to compensate for her lack of height.[1] She was terminated at the end of the shift. Pet. App. 2a, 28a-29a.

Petitioner then recalled Young, who was next on the recall list. He accepted the dryer-feeder position and performed better than Hill, but had difficulty in

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[1] Dryer-feeder operators are required to load pieces of wood veneer on a mechanical lift, raise the lift to a height of 4 to 4½ feet, and manually flip the veneer upwards to a vacuum pump which directs the veneer onto a belt. Pet. App. 28a. Hill is 4'11" tall and was 61 years old in February 1987. She had worked for petitioner for 12-13 years. Her pre-strike job as a labeler, which she had held for three to four years, required no heavy lifting or hand-eye coordination. Pet. App. 28a.

feeding the vacuum pump.[2] Young was terminated on his second day, for poor performance. Petitioner next contacted McGaha, who before the strike had driven a pickup and flatbed truck, and sometimes operated a forklift. McGaha had difficulty both in loading the lift and in feeding the vacuum pump.[3] He was terminated after working two shifts. Pet. App. 2a-3a, 30a-32a.

Thereafter, the positions that Hill and Young had held before the strike became vacant, and there were also openings in positions comparable to the one that McGaha had held. The vacant positions were not offered to the terminated employees, and were awarded to junior employees. Pet. App. 32a.

2. Affirming findings and conclusions entered by an administrative law judge, the Board held that petitioner had violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by failing to offer to reinstate Hill, Young, and McGaha to the positions they had held before the strike or to substantially equivalent positions when such positions became available. Pet. App. 23a-24a, 38a-39a. It ordere petitioner, *inter alia*, to offer Hill and Young reinstatement to their pre-strike positions and to offer McGaha reinstate-

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[2] The feeding process involved flipping individual sheets up with the fingers. Pet. App. 28a. Young had no thumbnails. C.A. App. 142-143. Young had been employed by petitioner for 12 years. For the two or three years preceding the strike, he had worked as a "flitch cleaner," a job that required placing split logs on a chain conveyor with the assistance of another employee. Pet. App. 30a.

[3] McGaha testified that he had a 15-20% disability in his left arm as a result of surgery the previous year. Pet. App. 31a-32a & n.4.

ment to his pre-strike position or a substantially equivalent position. *Id.* at 24a, 40a-41a.

The ALJ applied the analysis outlined in *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968), enforced, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970), in which the Board held that economic strikers who apply for reinstatement at a time when their positions are filled by permanent replacements "(1) remain employees; and (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons." Pet. App. 33a-34a. The ALJ noted that in this case it was undisputed that the employees in question had not been recalled to positions they held before the strike or to substantially equivalent positions. *Id.* at 34a. He concluded that the employees' inadequate performance in the positions to which they had been recalled was not a legitimate and substantial business reason for refusing to offer them reinstatement to the positions they had previously held. *Id.* at 36a-37a. In the alternative, the ALJ found that petitioner had discriminated against the three employees at issue by failing to follow its past practice of transferring individuals who could not perform a given job to another position that they could perform. *Id.* at 37a.

In affirming the ALJ's decision, the Board acknowledged that petitioner was not obligated to retain the three employees in the position in which they had failed to perform satisfactorily. Pet. App. 24a n.3. Nevertheless, the Board concluded, deficiencies in their performance in that job did not sufficiently

justify petitioner's failure to honor those employees' presumptive right to reinstatement in their pre-strike or equivalent positions. *Ibid.*

3. The court of appeals enforced the Board's order. Pet. App. 1a-22a. The court rejected petitioner's contention that an employer's obligations to striking employees are discharged when an employee accepts reinstatement to any position for which he or she is qualified. Noting that the Board "has consistently taken the position that employers must reinstate striking employees to their former or substantially equivalent positions before the employer's *Laidlaw* obligations are satisfied" (*id.* at 9a), the court concluded that this interpretation of the Act "is consistent with the policies and the language of the Act, and with the case law thus far" (*id.* at 10a).

The court explained that one of the policies of the Act is "to protect the rights of the employees to organize and strike" and that "employees will be deterred from striking if their employer can reinstate them to a lower-level position and thereby fulfill his [reinstatement] obligations." Pet. App. 11a. The Board's position, the court continued, was also consistent with the "theory behind [*NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967)] and *Laidlaw*," which is that "employees should not be penalized for striking, and they remain employees regardless of such action." Pet. App. 12a. Under this theory, the court of appeals reasoned, "a returning striker's right should not depend on the coincidence of which jobs may be open when he reaches the top of the recall list." *Ibid.* The court added that "[a]llowing the employer to satisfy its *Laidlaw* obligation by offering a striker a position which is not the one the striker is best able to perform (in contrast to his prestrike

position) could allow a system which forces the striker to accept a position at which he is predestined to fail and thus lose his original *Laidlaw* rights in the process." *Id.* at 16a.

The court also held that petitioner had not carried its burden of showing "a legitimate and substantial business justification for removing the employees from the recall list and refusing to place them in their former or substantially equivalent positions when such became available." Pet. App. 16a-17a. While (like the Board) the court acknowledged that petitioner had a legitimate reason for terminating the employees in question from the dryer-feeder position, the court found that their inadequate performance in that position "was not a sufficient reason for removing the employees from the eligibility list for their prestrike positions or their substantial equivalent." *Id.* at 17a.

Finally, the court rejected petitioner's contention that Section 10(c) of the Act, 29 U.S.C. 160(c), foreclosed the relief the Board had awarded. The court interpreted Section 10(c), which provides that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged * * * for cause," to prohibit the Board "from ordering employees reinstated to the positions from which they were discharged" (Pet. App. 21a). The court emphasized that the Board had not required reinstatement to the dryer-feeder position and that the basis for their terminations—"the employees' inability to perform in the lower-level positions"—was "not related" to the positions to which they were to be reinstated. *Ibid.*

At several points in its opinion, the court emphasized the limits on its decision. The court "[did] not

question [petitioner's] act of discharging the employees from the dryer-feeder position." Pet. App. 12a n.7; see *id.* at 13a, 17a. It stressed that it had not "immunize[d]" the employees in question from discipline for inadequate job performance, specifically noting that after the employees had been reinstated to their prestrike or substantially equivalent positions, they could be discharged "for their inability to perform the job or for other reasons constituting cause." *Id.* at 14a. Finally, the court twice stated that its decision was not "open-ended" and that "[a]dditional factual variations will present related questions" that it need not address until after the Board has had an opportunity to rule on them. *Id.* at 16a; see *id.* at 11a & n.7.[4]

ARGUMENT

As the court of appeals held, the Board's interpretation of the National Labor Relations Act in the context of this case—under which a striking employee who has been replaced during the strike is ultimately entitled, absent a countervailing legitimate business justification, to reinstatement in the same or a substantially equivalent position when an opening materializes—is reasonable and consistent with the language and policies of the statute. Moreover, there is no conflict warranting this Court's review between the decision in this case and decisions of other courts of appeals.

1.a. Under Section 2(3) of the National Labor Relations Act, 29 U.S.C. 152(3), the statutory definition of "employee" includes "any individual whose

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[4] On December 18, 1989, the court of appeals denied petitioner's request for a stay of its judgment enforcing the Board's order. On December 29, 1989, Justice Stevens denied an application to stay the mandate of the court of appeals.

work has ceased as a consequence of, or in connection with, any current labor dispute * * * and who has not obtained any other regular and substantially equivalent employment." Thus, an individual whose position is filled with a permanent replacement while he or she participates in a strike retains the rights that the Act confers on employees. In *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967), this Court recognized that when an employer refuses to reinstate a striking employee who has offered unconditionally to return to work, "the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by §§ 7 and 13 of the Act [29 U.S.C. 157, 163]." "Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice." 389 U.S. at 378. The absence of anti-union animus is no defense. Given the effect of non-reinstatement on "important employee rights," that conduct "constitutes an unfair labor practice without reference to intent." *Id.* at 380.

Fleetwood Trailer did not address the precise question presented here, which is whether an employer satisfies his obligation to striking employees by reinstating them to positions that are substantially less desirable than those the employees held before the strike. However, the Board has ruled in a variety of settings that the presumptive right to reinstatement is a continuing one and that employees are ultimately entitled to jobs that are the same as or substantially equivalent to those they held before the strike. See, *e.g.*, *Laidlaw Corp.*, 171 N.L.R.B. at 1369 (economic striker's preferential right to reinstatement is not extinguished because, at the time he applies, his position is occupied by a permanent re-

placement); *H & F Binch Co.*, 188 N.L.R.B. 720, 725 (1971) (acceptance of interim non-equivalent employment does not extinguish striker's right to former or equivalent position), enforced in pertinent part, 456 F.2d 357 (2d Cir. 1972); *Arlington Hotel Co.*, 273 N.L.R.B. 210, 217 (1984) (striker may refuse non-equivalent position without losing preferential reinstatement right), enforced, 785 F.2d 249 (8th Cir.), cert. denied, 479 U.S. 914 (1986); *Rockwood & Co.*, 281 N.L.R.B. 862, 877-878 (1986) (same), enforced, 834 F.2d 837 (9th Cir. 1987); *Coca-Cola Bottling Co.*, 269 N.L.R.B. 1101, 1102 (1984) (striker may accept and then relinquish non-equivalent interim employment without losing entitlement to pre-strike or equivalent position). Cf. *Custom Craft Mfg. Co.*, 212 N.L.R.B. 255, 258-259 (1974) (holding unlawful the reinstatement of unfair-labor-practice strikers to non-equivalent positions followed by discharge of those who were unable to perform).

b. In these various factual settings, the Board has adhered to essentially the same basic principle. When an employer refuses without a legitimate business justification to reinstate striking employees to positions substantially equivalent to those they held before a strike, the effect is to deter the exercise of the employees' statutory rights. In *Fleetwood*, this Court recognized that denying striking employees reinstatement after the conclusion of a strike will discourage employees from exercising their rights to organize and strike. 389 U.S. at 378. As the Board has held, that reasoning extends to cases in which strikers are reinstated, but only to jobs substantially less desirable than those they had held before participating in the strike. The threat inherent in petitioner's position—that a striking employee may be

relegated to any position for which he or she is believed to be qualified, no matter how menial, low-paying, or poorly suited to the employee's capabilities —would undoubtedly be a powerful deterrent to the exercise of the right to strike. To protect employees from that threat, it is entirely reasonable to require the employer to demonstrate a legitimate and substantial business justification for a refusal to reinstate a striking employee to his pre-strike position or one equivalent to it, even if that employee has been offered reinstatement to a lower-level position and has either accepted or rejected it.

Petitioner suggests that when a striking employee has accepted a lower-level position and has been terminated for cause, the employer's obligations should be at an end. See Pet. 16. However, as the Seventh Circuit recognized, that approach would subject employees to the threat of a penalty for the exercise of their right to strike (Pet. App. 11a):

> If lower-level positions are all that are available to an employee when he reaches the top of the recall list, he is likely to feel financial pressure (particularly after a long strike where most vacancies are filled) to take the position rather than wait until a position substantially equivalent to his pre-strike job becomes available. However, if accepting a lesser job means he may lose his right to reinstatement to his previous position if he is unable to perform satisfactorily, his options are limited. To ensure that the striker is not penalized for engaging in protected activity, we conclude that under the policies behind the Act, the process of reinstatement does not end until the employee receives his original position or one substantially equivalent to it.

As the facts of this case pointedly demonstrate, a termination for cause from one job does not neces-

sarily constitute a legitimate and substantial justification for refusing to reinstate a striker to his or her original position. See Pet. 16. Each of the employees in question had performed satisfactorily in their pre-strike positions for years (see Pet. App. 28a-31a), and the difficulties they experienced in their brief attempts to perform the dryer-feeder job did not suggest that they would be unable to resume their past employment in an equally satisfactory manner. When there is no showing that the employee's poor performance in an interim job has any bearing on his suitability to perform his pre-strike (or substantially equivalent) position, a refusal to offer the employee reinstatement in that position interferes with the exercise of the right to strike. The Board's solution to the problem presented by cases of this type—to require the employer to demonstrate a legitimate and substantial basis for refusing to return the employee to the position he occupied before the strike or to a substantially equivalent position—is an entirely appropriate accommodation of the policies embodied by the Act.[5]

c. Petitioner's contention that the Board's approach unjustifiably interferes with employer prerogatives

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[5] An employer may offer former strikers positions for which they are qualified, even if those positions are not substantially equivalent to those the employees have previously held. However, the fact that the employee may accept such an offer and acquire the protections of the Act with respect to that position does not mean he may be deprived of rights derived from his prior employment. Compare Pet. 18-19. Reinstatement in an interim position is a partial response to the risk that the right to strike may be deterred; the rights that the employee enjoys in the interim position are not a complete substitute for the protections the Board has reasonably determined are necessary to safeguard the right to strike.

(see Pet. 16, 19-22) rests upon a misreading of the Board's and the court's decisions. Obviously, the decision below does not "establish[]" that an employer who recalls an employee to an interim position "has no right to discharge that employee, for *any* reason, from the time the employee enters the work force until he obtains his former or a substantially equivalent job" (Pet. 19). The court of appeals "readily conced[ed]" that employers have the right to "discharge employees who are performing unsatisfactorily" (Pet. App. 11a-12a n.7), and nothing in the Board's decision suggests otherwise. Nor does the decision below establish, as petitioner claims, that an employer would be required to reinstate former strikers terminated from jobs not equivalent to their prior positions for such reasons as "absenteeism; acts of theft or violence; possession of narcotics; or even sabotage" (Pet. 20). The Board and the court found only that petitioner had failed, on the facts of this case, to show that the terminations of the employees in question justified a refusal to reemploy them in their pre-strike or equivalent positions. Those decisions do not suggest that a dismissal for cause will never provide such a justification.

The narrow legal issues presented by this case are whether an employer must demonstrate a legitimate and reasonable business justification for refusing to offer former strikers positions that are the same as or equivalent to those they occupied before a strike and whether a dismissal for cause in a different position invariably supplies such a justification. The Board's answers to those questions effect a reasonable "balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. at 378. Accordingly, the court of appeals

properly deferred to the Board's interpretation of the statute.

2. Contrary to petitioner's contention (Pet. 8-13), there is no conflict between the decision in this case and the Sixth Circuit's decision in *NLRB* v. *American Olean Tile Co.*, 826 F.2d 1496 (1987), calling for this Court's review. In *American Olean*, 12 economic strikers who offered to return to work before the end of the strike were placed in interim positions at a less desirable plant than the one in which they had worked prior to the strike. When openings occurred in the more desirable plant, the employer—in accordance with an undertaking it had made during the strike to reinstate strikers in the order in which they had offered to return to work—transferred them to those positions. Employees with more seniority who had worked at the more desirable plant before the strike and had not yet been reached on the employer's list argued, however, that they were entitled to these openings.

The Board agreed, holding that, since none of the employees in question had been fully reinstated, the preference based upon the order of the strikers' offers to return to work tended to discriminate against the employees who had remained off the job until the end of the strike and thus was inherently destructive of the right to strike. See 826 F.2d at 1499. The Sixth Circuit denied enforcement of the Board's decision, holding that the transfer of the 12 employees who had earlier accepted jobs at the less desirable plant was not unlawful discrimination based upon the exercise of rights protected by the Act. *Id.* at 1502. The Sixth Circuit rejected the Board's reasoning, finding that the 12 employees who received transfers had been reinstated "when they were recalled to work" at the less desirable plant. The court observed

that "[t]he law requires reinstatement when a vacancy occurs for which an offeror is qualified, whether in his previous position or a substantially equivalent one, or not" and an employee does not even have the option of declining an offer of reinstatement to a nonequivalent position. *Id.* at 1501.

The Sixth Circuit's view of strikers' rights, which petitioner declined to advocate in the court of appeals (Pet. App. 15a n.9), is narrower than that of the Board and of the court of appeals in this case. However, this difference does not warrant this Court's review. Unlike the case at bar, *American Olean* did not squarely present the issue of the full measure of reinstatement rights held by former strikers who had returned to less desirable jobs. In that case, the employer specifically undertook to reinstate strikers to their pre-strike or equivalent positions and did not seek to limit them, as petitioner's argument would, to less desirable positions for which they were minimally qualified. Thus, there is no conflict between the holding in *American Olean*, which was that the employer could abide by the chronological system that it had adopted during the strike to determine the order in which employees would be reinstated in their pre-strike or equivalent positions, and the holding in this case, which is that an employer bears the burden of justifying an outright refusal to reinstate striking employees to positions of that type. The Sixth Circuit might well take a different view of a striker's reinstatement rights if the issue were presented in a case in which an employer was seeking to *limit* employees to positions inferior to those they had occupied during a strike.[6]

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[6] Moreover, the majority in *American Olean* did not address the conflict between its reasoning and a long line of Board

3. Petitioner also contends that requiring reinstatement of the employees in question violates Section 10(c) of the Act. Pet. 14. However, as the court of appeals explained, Section 10(c) only prohibits an order requiring reinstatement of those employees to the dryer-feeder job from which they were terminated. Pet. App. 21a. The unfair labor practice here was *not* the discharge for failure to perform as dryer-feeders, but termination of the former strikers' preferential rights to reinstatement to their own, or substantially equivalent, jobs. Where, as here, the discharge for cause bore no relation to the employees' ability to perform their pre-strike jobs, Section 10(c) does not preclude the Board from re-

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authority and decisions by other courts of appeals. See pp. 8-9, *supra*.

Petitioner is mistaken in its assertion (Pet. 11-12) that *NLRB* v. *Rockwood & Co.*, 834 F.2d 837 (9th Cir. 1987), and *Medallion Kitchens, Inc.* v. *NLRB*, 811 F.2d 456 (8th Cir. 1987), provide no support for the Board's approach to reinstatement rights. In *Rockwood*, the court expressly held that where an interim job offered to an unreinstated striker "was not substantially equivalent to [his] former position, he was entitled to accept or reject it without affecting his status as an employee under section 152(3) or his right to reinstatement." 834 F.2d at 841-842. In *Medallion Kitchens*, the court noted that "[a]bsent a substantial and legitimate business justification, an employer's obligation is satisfied only upon an offer to the former striker of a substantially equivalent job." 811 F.2d at 459. The holding in *Medallion Kitchens*—that an employer unlawfully failed to recall employees to certain temporary jobs filled by new hires because those jobs were substantially equivalent to the unreinstated employees' pre-strike jobs—was also completely consistent with the court of appeals' reasoning here. 811 F.2d at 459-460.

quiring restoration of the strikers' preferential rights to their former or substantially equivalent positions.[7]

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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MAY 1990

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[7] As the legislative history makes clear, Section 10(c) was designed to prevent the Board from reversing discharges for cause. The Conference Report explained that "employees who are discharged or suspended for interfering with other employees at work * * * or for engaging in activities * * * contrary to shop rules * * * or for other cause * * * will not be entitled to reinstatement." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 55 (1947). Similarly, the House Report noted that the provision was "intended to put an end to the belief, now widely held and justified by the Board's decisions, that engaging in union activities carries with it a license to loaf, wander about the plant, refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct." H.R. Rep. No. 245, 80th Cong., 1st Sess. 42 (1947).

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No. 89-1371

In The

Supreme Court of the United States

October Term, 1989

David R. Webb Company, Incorporated,
Petitioner,

v.

National Labor Relations Board,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

1a. The Brief for the National Labor Relations Board in Opposition ("Br. Opp."), attempts to narrow the decision below by insinuating that Webb forced the three employees (Hill, Young, and McGaha) into positions in which they were predestined to fail because they were, somehow, physically unable to perform the work which they voluntarily accepted. (Br. Opp. 1-2, 6). The Court of Appeals, however, never questioned the ability of the reinstated employees to perform this work.

Indeed, neither the opinion below nor the underlying Board decision even alludes to the possibility that the three employees were physically incapable of performing the dryer-feeder work or that it was so onerous that the employee's poor performance could be excused. Both the opinion below and the Board's underlying decision recognized that the three employees were properly reinstated to the dryer-feeder position, and that Webb lawfully terminated them for performance deficiencies. (Pet. 8 n.2). Moreover, the Board refused to adopt the ALJ's finding regarding McGaha's alleged disability because that finding was not "fully supported by the record." (Pet. App. 23a-24a n.2; compare Br. Opp. 3 n.3).

1b. Premised in part on the above mischaracterization of the decision below, the Board argues that:

> The threat inherent in petitioner's position -- that a striking employee may be relegated to any position for which he or she is believed to be qualified, no matter how menial, low-paying, or poorly suited to the employee's capabilities -- would undoubtedly be a powerful deterrent to the exercise of the right to strike. (Br. Opp. 9-10).

There is both error and irony in this statement.

The error stems from the Board's gross mischaracterization of Webb's position. Webb does not seek to "relegate" reinstated strikers to less desirable positions. Rather, Webb merely requests that this Court review the unprecedented holding below that an employer can never satisfy the reinstatement obligation established in *NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967), short of reinstating the striker to his pre-strike or a substantially equivalent position. Where, as here, an employee *accepts* an offer of reinstatement in a position for which he is qualified -- an offer *Fleetwood* compels the

employer to make -- and is later discharged for cause, the employer is not required to make future offers of reinstatement.

The irony in the Board's characterization of Webb's position is that in *Arlington Hotel Company, Inc.*, 273 NLRB 210 (1984), *enf'd., Arlington Hotel Company, Inc. v. NLRB*, 785 F.2d 249 (8th Cir.), *cert. denied*, 479 U.S. 914 (1986), the Board *itself* imposed the legal standard which the Board now condemns as threatening. In *Arlington Hotel*, the Board, relying on *Fleetwood*, concluded that an economic striker must be offered reinstatement to any available position for which he is qualified even if it is less skilled and lower paid. The Board adopted the following analysis set forth in the ALJ's opinion:

> . . . I reject [the employer's] argument that an economic striker is only entitled to full reinstatement to his pre-strike job. Further I reject [the employer's] reliance on the failure of any striker to express an interest in a job other than his or her pre-strike job. [The employer] has the *obligation* to offer reinstatement to returning strikers and must do so without discrimination against the returning strikers. *A lesser job with less pay and/or reduced benefits may not be as attractive but is better than no job at all.*
>
> * * *
>
> I specifically find that [the employer's] refusal to consider striking employees, who made application to return, for positions other than their pre-strike positions discriminated against the strikers by such refusal and by showing partiality for newly hired employees. [The employer's] obligation is to offer vacancies to returning strikers.

273 NLRB at 215-217 (emphasis supplied). The Eighth Circuit Court of Appeals enforced the Board's decision, concluding

"that the [employer] discriminated against the strikers by not offering them jobs for which they were qualified." 785 F.2d at 251.

Thus, the Board's statement in this case that "an employer *may* offer former strikers positions for which they are qualified, even if those positions are not substantially equivalent to those the employees have previously held" (Br. Opp. n.5; emphasis supplied), obscures Webb's legal *obligation* to offer to reinstate the three employees to the dryer-feeder position -- "no matter how menial, low-paying, or poorly suited to the employee's capabilities . . . ." By following the Board's own mandate to offer the three employees the dryer-feeder position, Webb presented no "threat" to employee rights. In seeking review of the decision below, Webb merely seeks to balance an employee's absolute right to reinstatement against Webb's statutory rights to expect competent performance and discharge employees for just cause.[1]

[1]The Board implies that Webb was "seeking to *limit* employees to positions inferior to those" they held prior to the strike. (Br. Opp. 14). This is not Webb's position. The only "limit" advanced is that a discharge for cause from a position for which the employee was qualified, and which he voluntarily accepted, extinguishes any rights initially preserved to the employee by *Fleetwood*.

Similarly, the Board's Brief, following the Court of Appeals' reasoning, erroneously implies that adopting Webb's position in this matter "could allow a system which *forces* the striker to accept a position at which he is predestined to fail." (Br. Opp. 6; emphasis supplied). It is undisputed that the three employees at issue in this case voluntarily accepted the reinstatement Webb was legally required to offer; they were *not* "forced" to accept the dryer-feeder operator position.

1c. The Board is unable to cite a single decision which actually supports the extreme position taken by the Seventh Circuit.[2] The

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[2]The cases cited in the Board's Brief which purportedly support this unprecedented position are inapposite. (Br. Opp. 9). There is nothing in *H & F Binch Company*, 188 NLRB 720 (1971), which suggests the employer offered reinstated strikers "interim" employment, as if it was going to return the former strikers to their former positions at some point in the future. The employer offered those strikers "jobs as *new employees* at the *minimum wage rate* and *without credit for past seniority*. . . ." *Id.* at 725 (emphasis supplied). Under the egregious facts in *Binch*, the Board never had to go beyond the fact that the employer did not *begin* to comply with *Fleetwood*.

Far from supporting the Board's position, *Arlington Hotel*, discussed earlier, principally stands for the proposition that an employer is obliged by law to extend to former strikers an offer of *any* position for which the striker is *qualified*. It says nothing and implies nothing about the reinstatement rights of an employee who accepts that position and is later discharged for just cause. The same is true of *Rockwood & Company*, 281 NLRB 862 (1986), *enf'd*, 834 F.2d 837 (9th Cir. 1987). In *Rockwood*, the Board and Court of Appeals noted that an employee who *refuses* the offer of work for which he is qualified does not lose the rights established by *Fleetwood*. 834 F.2d at 841-842. There, moreover, the employer threatened the employee that, if he turned the offer down, he would be discharged. 281 NLRB at 877.

Coca-Cola Bottling Company, 269 NLRB 1101 (1984) and *Custom Craft Manufacturing Company*, 212 NLRB 255 (1974) are completely irrelevant. Both involved unfair labor practice strikes, not economic strikes. Since the rights of unfair labor practice strikers are different from those of economic strikers -- entitling the former to immediate reinstatement to substantially equivalent positions upon an unconditional offer to return to work, *see Custom Craft*, 212 NLRB at 258 -- *Fleetwood* is not even discussed in either case.

Footnote continued on next page

Board therefore attempts to minimize the sweep of the decision below by arguing that:

> When there is no showing that the employee's poor performance in an interim job has any bearing on his suitability to perform his pre-strike (or substantially equivalent) position, a refusal to offer the employee reinstatement in that position interferes with the exercise of the right to strike. (Br. Opp. 11).

This is not the legal standard established by the decision below. The Court of Appeals held, quite clearly, that *Fleetwood* requires reinstatement to the striker's pre-strike or a substantially equivalent position, and that a discharge for cause from a position for which the employee is qualified does not extinguish that right. There is no suggestion that a different result would obtain if the non-equivalent position "had a bearing on his suitability to perform his pre-strike or a substantially equivalent position." The decision below is a broad and unqualified holding that unless an employee is reinstated to his former or a substantially equivalent position, a discharge for cause is not a legitimate and substantial business justification for extinguishing a striker's rights under *Fleetwood*. (Pet. App. 16a-17a).

Moreover, in view of the requirement that an employer must reinstate strikers to the first available position for which they are qualified, even if it is a "lesser position," the legal standard

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Notably, the Board now abandons the cases cited by the Court of Appeals in support of its statement that "[t]he NLRB has consistently taken the position that employers must reinstate striking employees to their former or substantially equivalent positions before an employer's *Laidlaw* obligations are satisfied." (Pet. App. 9a). Those cases are discussed in Webb's Petition. (Pet. 12-13 n.4).

suggested by the Board would be meaningless even if it had been adopted by the Seventh Circuit. In virtually every case where an employer hires permanent replacements during a strike, as was the case here, the only positions initially available to returning strikers will be non-equivalent ones. These positions will seldom, if ever, bear any relationship to the reinstated striker's "suitability" to perform his pre-strike position. Thus, an employer almost never would be justified in terminating a reinstated striker for poor performance. And, of course, comparing objective position requirements will never measure reinstated strikers' *willingness* to put forth the requisite effort to meet an employer's legitimate, non-discriminatory business expectations.[3]

The impact of the Court of Appeals' decision is devastating. Employers are required to offer strikers reinstatement to positions for which they are qualified. If the striker accepts and thereafter fails to perform, an employer cannot sever the employment relationship. Rather, the employee must be returned to the recall list and, presumably, be reinstated to the next position for which he is qualified. If his performance is again deficient, this procedure is repeated, *ad infinitum*, until he obtains substantially equivalent employment. This holding is now the law in the Seventh Circuit. This is the holding for

[3]Significantly, neither the ALJ nor Board made any finding that the three reinstated employees were willing to put forth the necessary effort. Indeed, there was testimony at the hearing that the reinstated employees *could* perform the work, but simply "would not". (Pet. App. 31A). Moreover, the evidence Webb introduced at trial showed that other reinstated strikers easily performed this entry-level work, as did new hires, thus demonstrating it was the employees' *effort* which was lacking, not ability. (Pet. App. 32a-33a).

which Webb seeks review, not the Board's incorrect characterization.[4]

2. The Board argues that there is no conflict between the decision below and the Sixth Circuit's decision in *NLRB v. American Olean Tile Co.*, 826 F.2d 1496 (1987). (Br. Opp. 13-14). But the conflict was recognized even in the opinion below (Pet. App. 15a n.9), and is elsewhere acknowledged by the Board's statement that *American Olean* conflicts "with a long line of Board authority and decisions by other courts of appeals." (Br. Opp. 14-15 n.6)

Moreover, the dispute in *American Olean* stemmed from the fact that twelve reinstated employees were transferred to another plant -- where they had worked prior to the strike -- when openings occurred, even though there were "more senior [unreinstated] employees whose names had not been reached on the chronological [list]" who also were seeking reinstatement at the other plant. 826 F.2d at 1498. The ALJ found that this transfer constituted a violation of the Act *because* "the [transferred] employees were not fully reinstated when they were [initially reinstated], but only when

[4]The Board states that the ALJ found "in the alternative" that Webb "had discriminated against the three employees at issue by failing to follow its past practice of transferring individuals who could not perform a given job to another position that they could perform." (Br. Opp. 4). This was not even a "holding," let alone an "alternative" holding, and neither the Board nor Court of Appeals refer to this finding in their decisions. The Board's finding that Webb was privileged to terminate them for "poor performance" -- without any reference to Webb's obligation to transfer them to other positions -- confirms that the *only* employment decision at issue was Webb's failure to reinstate the employees to their pre-strike or substantially equivalent positions, not its decision to discharge them or its alleged failure to transfer them.

they were transferred to [to their former plant]." 826 F.2d at 1498-1499. The Sixth Circuit, by contrast, held that:

> [T]he reinstatement of the twelve (12) employees occurred when they [initially] were recalled to work . . . The ALJ's [erroneous] construction [of *Fleetwood*] would permit an employee to decline an offer of reinstatement to a position for which he was merely qualified and later demand reinstatement to his former position or to a substantially equivalent one when it became vacant.

826 F.2d at 1501.

The court therefore refused to enforce the Board's order because it concluded *Fleetwood* is satisfied when a striker is offered reinstatement to *any* position for which he is qualified. Thus, the Sixth Circuit's view of the extent of the *Fleetwood* reinstatement obligation: (1) was essential to its holding; and (2) is in direct conflict with the Seventh Circuit's holding below.

3. The Board fails to identify any statutory language or legislative history which supports the Court of Appeals' direct contravention of Section 10(c). (Br. Opp. 15-16). The Board argues only that since "the discharge for cause bore no relation to the employees' ability to perform their pre-strike jobs" Section 10(c) is inapplicable. (Br. Opp. 15).

This argument, like the decision below, cannot be reconciled with the language of the statute, which unambiguously provides:

> No order of the Board shall require the reinstatement of *any* individual *as an employee* who has been suspended or discharged or the payment to him of any backpay if

such individual was suspended or discharged *for cause*. (Emphasis supplied).

It is undisputed that the employees here were terminated "for cause." Under this plain statutory language, the Board is prohibited from reinstating them *as employees* -- regardless of the *position* to which they are reinstated

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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